Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GARY GIBSON, Warden,
Oklahoma State Penitentiary,

Petitioner,

v.

MARK DAVID JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), a majority of this Court held that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible."

The issue presented in this case is whether the rule announced in *Simmons* applies to a capital sentencing scheme like Oklahoma's where the jury is provided a three-way punishment choice, namely, life imprisonment, life imprisonment without parole, or death.

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Gary Gibson, Warden, Oklahoma State Penitentiary, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's decision granting federal habeas relief in favor of the Respondent is reported at 254 F.3d 1155. It is reprinted at pages 1 through 22 of the appendix accompanying this petition ("App."). The Order of May 24, 2001, denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* has not been reported. It is reprinted at page 116 of the appendix.

The District Court's Order entered December 9, 1999, has not been reported. It is reprinted at pages 23 to 87 of the appendix. Additionally, the opinion of the Oklahoma Court of Criminal Appeals is reported at 928 P.2d 309 and is reprinted at pages 88 to 112 of the appendix. The Oklahoma Court of Criminal Appeals' opinion granting rehearing but denying relief is also reprinted at pages 113 to 115 of the appendix.

JURISDICTION

The Tenth Circuit entered its opinion and judgment on April 27, 2001 (App. 1). The Order denying Petition for Rehearing and Suggestion for Rehearing *En Banc* was

entered on May 24, 2001 (App. 116). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV(1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

Okla. Stat. tit. 21, 701.9(A) (1991):

A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life.

STATEMENT OF THE CASE

The instant case presents an opportunity for this Court to resolve an ongoing conflict between decisions of

the United States Court of Appeals for the Tenth Circuit and the Oklahoma Court of Criminal Appeals regarding the applicability of *Simmons v. South Carolina*, 512 U.S. 154 (1994), to Oklahoma's triple-option capital sentencing scheme. In *Simmons*, a majority of the Court held that where the State puts the defendant's future dangerousness in issue, and the *only* available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury that he or she is parole ineligible. The holding in *Simmons* was essentially restated in this Court's recent decision in *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001).

In granting the Respondent federal habeas relief, the United States Court of Appeals for the Tenth Circuit relied upon its previous extension of *Simmons* to Oklahoma's capital sentencing scheme where life without the possibility of parole is not the only legally available sentence alternative to death. This holding directly conflicts with the Oklahoma Court of Criminal Appeals' repeated holdings that *Simmons* has no applicability to Oklahoma's triple-option capital sentencing scheme. It also directly conflicts with this Court's decisions in *Simmons* and *Shafer* as well as the applicable standard of review mandated by 28 U.S.C. § 2254(d).

The jurisdiction of the District Court was based upon 28 U.S.C. § 2241.

1. Proceedings in State Courts.

On the evening of July 24, 1991, the Respondent beat Billy Webb in the head with a baseball bat while co-defendant Rickey Masquat poured gasoline on Webb from a plastic jug and set him on fire. The next morning, a passing motorist discovered Webb standing naked in the middle of a road outside Marietta, Oklahoma. Webb was bleeding from the head wound and he suffered second and third degree burns over ninety-five percent of his body. Despite his injuries, Webb lived for approximately seventeen hours after being beaten and burned. He remained alert and coherent during this time, rejecting sedatives in the hopes that he would be able to talk with his mother before he died.

Respondent was tried in the District Court of Love County in Case No. CRF-91-46. Respondent was convicted of Murder in the First Degree, in violation of OKLA. STAT. tit. 21, § 701.7(A) (1991). Pursuant to Oklahoma law, the jury was instructed at the close of the penalty phase that its punishment options for first degree murder were "death, imprisonment for life without parole, or imprisonment for life" (Tr. 720); OKLA. STAT. tit. 21, § 701.9(A) (1991).

During penalty phase deliberations, the jury sent out a note bearing the following question: "We need to know is life without parole firm? Does it mean you can never be paroled?" (Tr. 746). Over defense counsel's objection, the trial court replied as follows: "It is inappropriate for you to consider the question asked" (Tr. 746-47). The jury subsequently found the existence of two aggravating circumstances: (1) the murder was especially heinous,

atrocious or cruel; and (2) there was a probability that the defendant would pose a continuing threat to society, pursuant to OKLA. STAT. tit. 21, § 701.12(4) & (7) (1991). The jury sentenced Respondent to death.

Respondent appealed his conviction and death sentence to the Oklahoma Court of Criminal Appeals. On direct appeal, Respondent argued, *inter alia*, that the trial court's answer to the jury's question regarding the meaning of life without parole constituted error under *Simmons* because the very nature of Oklahoma's capital sentencing scheme required the jury to consider whether Respondent would be eligible for parole if he received a non-capital sentence. While finding the trial court's response constituted error under state law, the Oklahoma Court of Criminal Appeals deemed any error harmless beyond a reasonable doubt under the familiar *Chapman v. California*, 386 U.S. 18 (1967), harmless error analysis.

In denying this claim, the state appellate court recognized the trial court's duty under Oklahoma law not to inform the jury of the inner workings of the state parole system, even when it must compare two life sentences: one with the possibility of parole, the other without the possibility of parole. Because the trial court's response was essentially non-responsive, the Oklahoma Court of Criminal Appeals found that "[t]he ultimate effect of . . . [this] response[ ] was to force the jurors back to the plain language of the instructions." *Johnson v. State*, 928 P.2d 309, 320 (Okla. Crim. App. 1996) (App. 108). Hence, any constitutional error stemming from the trial court's erroneous instruction was deemed harmless beyond a reasonable doubt by the Oklahoma court in that it did not

affect the jury's decision to impose the death penalty. *Id.* (App. 108).

2. Proceedings in the District Court.

On February 1, 1999, the Respondent filed a Petition for Writ of Habeas Corpus with the District Court, seeking relief under 28 U.S.C. § 2254. Once again, the Respondent claimed that the trial court's answer to the jury's question regarding life without parole represented federal constitutional error. Specifically, the Respondent urged that *Simmons* required the trial court to inform the jury that he would not be eligible for parole if sentenced to life without parole. The District Court rejected this contention, finding, *inter alia*, that Justice O'Connor's concurring opinion "makes it clear the rule in *Simmons* applies only in those cases where 'the only [alternative] available sentence to death is life imprisonment without possibility of parole.' " (App. 68) (quoting *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring)). The Court thus found that the trial court's response did not represent error of a constitutional magnitude. However, even if it did, the District Court alternatively found the Oklahoma court's harmless error analysis was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. Accordingly, the District Court denied relief pursuant to 28 U.S.C. § 2254(d).

3. Proceedings in the Tenth Circuit.

Respondent timely appealed from the District Court's Order denying his Petition for Writ of Habeas

Corpus. The Tenth Circuit reversed the District Court's decision based upon the instant issue. *Johnson v. Gibson*, 254 F.3d 1155 (10th Cir. 2001) (App. 1-22).

The Tenth Circuit found error in the trial court's answer to the jury's question regarding parole because the jury was not merely referred back to the court's original sentencing instructions. *Id.* at 1165 (App. 17). Unlike the District Court, the Tenth Circuit found federal constitutional error, pursuant to *Simmons* and *Shafer*, mandating harmless error analysis. Relying upon *Simmons* and *Shafer*, the Court found the trial court's response to the jury's question regarding parole represented constitutional error that was not harmless. The Court first discussed *Shafer* in resolving Respondent's claim:

> **Although South Carolina maintained that *Simmons* did not apply, the Court [in *Shafer*] extended *Simmons* to situations where the jury's choice is between life without parole and death, even if a third alternative encompassing release is available to the court.** *Id.* at 1273. The Court held that "whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that the life sentence carries no possibility of parole." *Id.* The Court recognized that the jury was confused by the absence of such instruction as evidenced by its further question about parole eligibility, and firmly rejected the trial court's response that parole eligibility was not for the jury's consideration.

Id. at 1166 (App. 18) (emphasis added). The Court continued:

> The same is true here. Contrary to the state appellate court's harmless error analysis, *Johnson*, 928 P.2d at 320, the trial court's instruction that it was inappropriate for the jury to consider parole eligibility did not refer the jury back to the instructions; rather, it plainly contradicted those instructions. The trial court did more than give a non-responsive answer – it told the jury that parole eligibility could not be considered when plainly it could be. At best, the jury had a conflict between the court's instructions as to whether it was proper to consider parole eligibility in imposing sentence. At worst, the jury may very well have thought that parole was available, even with the life without parole option, but for some unknown reason it could not consider that fact.

Id. at 1166 (App. 19). The Court then concluded that, to the extent that the state appellate court applied *Simmons*, its decision that the instruction was harmless error constitutes an unreasonable application of federal law, pursuant to 28 U.S.C. § 2254(d)(1). To the extent that the state appellate court did not rely upon *Simmons*, the Tenth Circuit concluded that the incorrect instruction had substantial and injurious effect or influence in determining the jury's verdict and therefore could not be deemed harmless error under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Id.* at 1166-67 (App. 19-20).

REASONS FOR GRANTING THE WRIT

Petitioner seeks review because the judgment below (1) is in direct conflict with this Court's decisions in *Simmons* and *Shafer*; (2) is in direct conflict with the Oklahoma Court of Criminal Appeals' consistent holdings that the rule in *Simmons* has no applicability to Oklahoma's capital sentencing scheme; and (3) conflicts with the deference provisions mandated by the Antiterrorism and Effective Death Penalty Act of 1996.

The instant case illustrates the fine line trial judges in capital cases must walk when responding to juror inquiries about the meaning of life imprisonment without parole. Oklahoma capital sentencing juries are instructed that the punishment for murder in the first degree shall be imprisonment for life, imprisonment for life without parole or death. It is not uncommon for a capital sentencing jury to send a note to the trial judge during penalty phase deliberations inquiring about the true meaning of the life without parole option. *See Johnson v. State*, 928 P.2d 309, 321 (Okla. Crim. App. 1996) (Chapel, J., specially concurring) (App. 111) ("[w]e continue to see case after case where the jury sends a note to the trial judge during deliberations inquiring about the possibility of parole").

The approved response to such questions under Oklahoma law is to provide the non-response of directing the jury back to its original instructions. *Id.* at 319-20 (App. 106-08). To actually answer the jury's question would require reference to the Governor's power to commute a sentence of life without parole by means of the clemency process. *See* OKLA. CONST. art. VI, § 10; *Mayes v. State*, 887 P.2d 1288, 1316-18 (Okla. Crim. App. 1994).

Were a jury advised of the possibility of release notwithstanding the "without parole" aspect of the life without parole term, it might opt instead for death.

The Oklahoma Court of Criminal Appeals found that the trial judge's response was error under Oklahoma law because it did not expressly refer the jury back to the instructions previously given. The Tenth Circuit's decision in this case, however, penalizes on federal constitutional grounds what amounts to a state law error. It does so by improperly extending *Simmons* and *Shafer* to a situation where no "false choice" of the type safeguarded by those decisions was possible in light of the three-way sentencing choice presented to Respondent's jury. By so doing, the Tenth Circuit's decision needlessly jeopardizes reversal in every Oklahoma death penalty case where the jury asks for further definition of the life without parole sentencing option and the trial judge erroneously provides an honest, albeit ambiguous, answer.

Taken out of the context in which it was given, the trial judge's answer can be read to say that the jury cannot consider parole eligibility or ineligibility in choosing a sentence. However, the three-way sentencing choice presented Respondent's jury eliminated this possibility, making clear that the jury understood the trial judge's answer as it was intended – i.e., that the jury must not consider whether future contingencies, like executive clemency or pardon, may result in Respondent's release if life without parole is assessed as a penalty. Thus, in granting habeas sentencing relief, the Tenth Circuit extends *Simmons* to a context where it should not apply. In the process, the Court of Appeals finds constitutional error where it does not exist, guts the deference to the

state court's adjudication of this issue mandated by the AEDPA and grants habeas sentencing relief for a pure state law error.

1. The Tenth Circuit's Decision Directly Conflicts with this Court's rulings in *Simmons* and *Shafer*.

In *Simmons*, a majority of this Court held that "[w]here the State puts the defendant's future dangerousness in issue, **and the only available alternative sentence to death is life imprisonment without possibility of parole**, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible." *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring in judgment) (emphasis added); *see also id.* at 163-164 (plurality opinion); *Shafer*, 121 S. Ct. 1263, 1272 (2001) (quoting *Simmons*, 512 U.S. at 162 ("It did not comport with due process, we held, for the State to 'secur[e] a death sentence on the ground, at least in part, of [defendant's] future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its [only] noncapital sentencing alternative, namely, that life imprisonment meant life without parole.' ")).

In *Shafer*, the South Carolina Supreme Court had held *Simmons* generally inapplicable to South Carolina's new sentencing scheme because it found a third possible sentence, a mandatory minimum thirty year sentence, was available if the jury did not unanimously find the existence of at least one aggravating circumstance alleged by the State. *Shafer*, 121 S. Ct. at 1270-71. This Court appropriately rejected the South Carolina court's rationale:

> **This reasoning might be persuasive if the jury's sentencing discretion encompassed the three choices the South Carolina court identified. But, that is not how the State's new scheme works.** *See supra,* at 1267-1268. Under the law now governing, in any case in which the jury does not unanimously find a statutory aggravator, death is not a permissible sentence and *Simmons* has no relevance. In such a case, the judge alone becomes the sentencer. S.C. Code Ann. § 16-3-20(C) (2000 Cum.Supp.). Only if the jury finds an aggravating circumstance does it decide on the sentence. *Ibid.* **And when it makes that decision, as was the case in *Simmons, only two sentences are legally available under South Carolina law: death or life without the possibility of parole. Ibid.***

Id. at 1272 (emphasis added). Because the jury is presented with only two sentencing options under South Carolina law after finding the existence of an aggravating circumstance – i.e., "life imprisonment" or death – Shafer's jury was in the same position as the jury in *Simmons. Id.* at 1273.

Despite the Tenth Circuit's extensive reliance upon *Shafer, see Johnson,* 254 F.3d at 1165-66 (App. 17-19), the sentencing scheme there stands in sharp contrast to the instant case where the jury is provided a three-way sentencing option. The Tenth Circuit's decision therefore has the effect of extending the narrow holding in *Simmons* to situations where the jury's choice is between life without parole and death, even if a third alternative encompassing release is available. Such effect is directly contrary to the holding in *Simmons* as restated in *Shafer.*

In this sense, the trial court's response to the jury's question, while arguably ambiguous, did nothing to trigger *Simmons*. The trial court did not tell the jury that life without parole was not a sentencing option. Nor was the jury affirmatively told that Respondent could be paroled if assessed life without parole. The trial court did not prevent argument from defense counsel, in response to the prosecution's allegation of future dangerousness, that Respondent would never be paroled. Rather, the trial court provided an honest, albeit ambiguous, response to the jury that it was essentially not to consider whether a sentence of life without parole could be altered by future developments, such as a grant of executive clemency.

Extension of the rule in *Simmons* and *Shafer* to Oklahoma's triple-option sentencing scheme does not withstand scrutiny as this is not a case where the jury reasonably may have believed that the Respondent could be released on parole if he were not executed. The rule in *Simmons* and *Shafer* is premised upon the idea that the State may not secure a death sentence on the ground of the defendant's future dangerousness while at the same time concealing from the jury the true meaning of its only noncapital sentencing alternative. *Simmons*, 512 U.S. at 162. In the instant case, nothing was concealed from Respondent's jury other than that mandated by state law – i.e., information regarding the hypothetical possibility of parole by means of executive clemency. Nor was Respondent's jury deceived about the true meaning of the life without parole sentencing option. Indeed, Respondent's jury had two noncapital sentencing alternatives, not merely one. Thus, nothing the trial judge said skewed the true meaning of the life without parole sentencing option.

In the words of this Court's Rule 10(a), the Tenth Circuit has decided an important federal question in a way that conflicts with relevant decisions from this Court. Because of the particulars of the sentencing scheme at play in *Shafer*, this Court was unable to fully address the impact of an answer like the one given to the Respondent's jury in light of a three-way sentencing choice. Considering the lack of lower-court authority on this precise issue, the Tenth Circuit's decision has the potential to directly affect not just Oklahoma death penalty cases, but cases from the many states with triple- or multiple-option sentencing schemes. *See* GA. CODE ANN. § 17-10-31.1(d) (1997); MD. ANN. CODE art. 27, § 413(c)(iii) (1957); NEV. REV. STAT. § 200.030(4)(a)-(b) (1998); OR. REV. STAT. § 163.150 (1999); TENN. CODE ANN. § 39-13-204 (1997); UTAH CODE ANN. § 76-3-207 (2000).

The Tenth Circuit's decision provides a needless windfall to the worst of society's offenders. This is especially offensive considering the lack of a perfect solution available to trial judges when responding to juror questions about the meaning of life without parole. The answer provided to Respondent's jury was a correct statement of the law. The answer was completely honest. The sum effect of this answer, as noted by the Oklahoma appellate court, was simply to not respond. It cannot be said that the response provided by the trial judge was any more likely to mislead the jury into believing "that parole *was* available but that the jury, for some unstated reason, should be blind to this fact," *Shafer*, 121 S. Ct. at 1274 (quoting *Simmons*, 512 U.S. at 170), than would simply referring the jury back to the existing instructions. Both answers could lead to speculation by the jury

regarding whether parole was hypothetically available under state law if Respondent was sentenced to life without parole. Both answers are equally non-responsive. In this sense, extension of the rule in *Simmons* to triple option capital sentencing schemes like Oklahoma's represents an unnecessary and total overreaction to the trial judge's answer. The three sentencing options standing alone eliminate the possibility that the jury in this case was presented a "false choice" regarding sentencing, a fact recognized in *Simmons* and *Shafer*.

Hence, the instant case presents an opportunity for this Court to resolve definitively the applicability of *Simmons* to triple option sentencing schemes where the trial court provides an honest, albeit ambiguous, response to the jury regarding their consideration of parole. This Court should grant certiorari review to resolve this important issue.

2. The Tenth Circuit's Decision Directly Conflicts with the Oklahoma Court of Criminal Appeals' Rulings that *Simmons* Does Not Apply to Oklahoma's Capital Sentencing Scheme.

The Oklahoma Court of Criminal Appeals, the court of last resort in Oklahoma for criminal matters, *see* OKLA. CONST. art. VII, § 4, has long held that *Simmons* has no applicability to Oklahoma's capital sentencing scheme. *See, e.g., Fitzgerald v. State*, 972 P.2d 1157, 1171 n.56 (Okla. Crim. App. 1998) (citing *Hain v. State*, 919 P.2d 1130, 1145 (Okla. Crim. App. 1996), *cert. denied*, 519 U.S. 1031 (1996); *Hamilton v. State*, 937 P.2d 1001, 1011-12 (Okla. Crim. App. 1997), *cert. denied*, 522 U.S. 1059 (1998); *Trice v. State*, 912

P.2d 349, 351-52 (Okla. Crim. App. 1996)) ("[t]his Court has held *Simmons* does not apply to Oklahoma's capital sentencing structure since Oklahoma capital juries are aware that a defendant may be sentenced to life, life without the possibility of parole, or death").

By contrast, the Tenth Circuit has consistently applied *Simmons* to Oklahoma's capital sentencing scheme, instead finding that Oklahoma's triple-option sentencing scheme satisfies *Simmons*. *See McGregor v. Gibson*, 219 F.3d 1245, 1256 (10th Cir. 2000); *Mayes v. Gibson*, 210 F.3d 1284, 1294 (10th Cir. 2000). Hence, in the words of Rule 10(a), the Tenth Circuit has entered a decision that conflicts with the decisions by a state court of last resort.

This point is critical to understanding the Oklahoma Court of Criminal Appeals' holding in this case. The Tenth Circuit opines that the Oklahoma court may actually have found *Simmons* error stemming from the trial judge's answer to the jury's question based upon its application of the *Chapman* harmless error standard to this claim. *Johnson*, 254 F.3d at 1165 (App. 17). The Tenth Circuit decision ignores, however, that the Oklahoma court's silence regarding *Simmons* in its analysis of Respondent's claim stems directly from the state court's prior holdings that *Simmons* had no applicability to Oklahoma's capital sentencing scheme. Indeed, *Hain* and *Trice* which provided the first in-depth analysis of this issue in Oklahoma, were decided several months prior to the Court's decision in Respondent's case. *Compare Trice*, 912 P.2d at 352 (decided Feb. 29, 1996) and *Hain*, 919 P.2d at 1145 (decided June 7, 1996) *with Johnson*, 928 P.2d at 319-20 (App. 88) (decided Aug. 5, 1996). Hence, it is clear that the Oklahoma Court of Criminal Appeals did not

apply *Simmons* to Respondent's claim because the state appellate court has consistently held that *Simmons* has no applicability to Oklahoma's capital sentencing scheme.

Because *Simmons* does not apply to Oklahoma's triple option capital sentencing scheme, no federal constitutional error exists and the Oklahoma Court of Criminal Appeals afforded the Respondent more process than he was due under existing law. The Tenth Circuit's harmless error analysis is groundless in light of the lack of identifiable federal constitutional error demonstrated by Respondent's *Simmons* claim. This Court has made clear that "the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). In this sense, the conflict between the decisions from the state appellate court and Tenth Circuit takes on a greater significance and is central to resolving definitively the instant issue.

3. The Tenth Circuit's Decision Conflicts with the Deference Provisions Mandated by the Antiterrorism and Effective Death Penalty Act of 1996.

The Tenth Circuit's extension of *Simmons* to Oklahoma's capital sentencing scheme likewise conflicts with the deference for state court decisions mandated by the Antiterrorism and Effective Death Penalty Act of 1996. The Court found that the Oklahoma court's analysis "was an unreasonable application of harmless error to the *Simmons* error," in violation of 28 U.S.C. § 2254(d). *Johnson*, 254 F.3d at 1165 (App. 17).

In this sense, the Tenth Circuit's decision conflicts with Section 2254(d) in that clearly-established precedent

from this Court has not extended the rule in *Simmons* and *Shafer* to triple option capital sentencing schemes. Indeed, as discussed above, *Simmons* and *Shafer* both make clear that the rule articulated in those cases applies only where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole. *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring in judgment) (emphasis added).

In short, *Simmons* has been narrowly construed by this Court and has not been extended beyond its particular facts. *See Ramdass v. Angelone*, 530 U.S. 156 (2000) (finding *Simmons* inapplicable to petitioner since he was not parole ineligible when the jury considered his case); *United States v. Stitt*, 250 F.3d 878, 889 & 893 n.15 (4th Cir. 2001) (finding *Shafer* "essentially restates the Court's holdings in *Simmons* and *Ramdass* and that "*Simmons* has been narrowly construed . . . by the Supreme Court"). And, as discussed above, *Simmons* itself makes clear that it does not apply to triple option sentencing schemes like Oklahoma's. It can hardly be said, therefore, that it was "objectively unreasonable" for the Oklahoma court to conclude that Respondent was not entitled to relief on his *Simmons* claim in light of clearly established Supreme Court precedent. *Cf. Penry v. Lynaugh*, 121 S. Ct. 1910, 1919 (2001) (finding Texas court's decision not objectively unreasonable under Section 2254(d) review considering substantial differences between Penry's case and *Estelle v. Smith*, 451 U.S. 454 (1981) upon which Penry's Fifth Amendment claim relied, fact that *Estelle* suggested that its holding was limited to the "distinct circumstances" presented there, and the fact that Court had never

extended *Estelle*'s Fifth Amendment holding beyond its particular facts).

The question presented on federal habeas review is whether the Oklahoma court's decision was contrary to or an unreasonable application of this Court's precedent. It clearly was not. As noted by the District Court, and discussed above, the differences between this case and *Simmons* and *Shafer* are substantial (App. 67-69). In *Shafer*, this Court suggested that the result there might be different if the South Carolina sentencing scheme actually provided three sentencing options once the jury found the existence of an aggravating circumstance. *Shafer*, 121 S. Ct. at 1272. Moreover, this Court has never extended *Simmons'* Fourteenth Amendment due process holding beyond its particular facts.

The Tenth Circuit's extension of *Simmons* to Oklahoma's triple-option capital sentencing scheme conflicts with the standard of review provisions that govern this federal habeas claim. Certiorari review is therefore warranted to limit the reach of *Simmons* as intended by this Court as well as to reinforce the deference provisions mandated for future federal habeas claims under the AEDPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARK DAVID JOHNSON, Petitioner-Appellant, vs. GARY GIBSON, Warden, Oklahoma State Penitentiary, Respondent-Appellee.	)	No. 00-7008

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

(D.C. No. 98-CV-331)

(Filed April 27, 2001)

Stephen J. Greubel, Tulsa, OK, for Petitioner-Appellant.

William L. Humes, Assistant Attorney General (and W.A. Drew Edmondson, Attorney General, on the brief), Oklahoma City, Oklahoma, for Respondent-Appellee.

Before **KELLY, BALDOCK**, and **HENRY**, Circuit Judges.

KELLY, Circuit Judge.

Petitioner-appellant Mark David Johnson appeals the district court's denial of habeas relief, *see* 28 U.S.C. § 2254, from his Oklahoma first degree malice murder conviction and death sentence. Johnson was convicted of acting with Ricky Masquat to beat and set afire Billy Webb, resulting in Webb's death. Johnson and Masquat lived and worked at an apartment complex in Norman, Oklahoma. The thirty-three year old victim lived with his mother in that same complex. Residents described the victim as friendly, but a little strange, slow, childlike, and as having mental problems. He spent most of his time walking around the apartment complex and playing with the children who lived there. Johnson expressed concerns that Webb would harm the children. Three days before the murder, Johnson, in Masquat's presence, stated to the apartment manager that Webb was evil and that if Johnson ever thought that Webb would hurt the manager's children, Johnson would take a baseball bat to Webb, pour gasoline on him and burn him up – then no one would ever have to worry about Webb again.

Three days later, Johnson, Masquat and Webb left the apartment complex in Masquat's pickup truck. Webb had told another resident that he was going "partying." The next morning, the victim was found on a deserted country road one hundred miles south of Norman. He had suffered second and third degree burns over more than ninety-five percent of his body, wounds which would eventually prove fatal. He had also been hit over the head, although that wound was itself not life threatening. Despite his injuries, Webb remained alert and coherent for approximately seventeen hours after the attack. He was able to describe Johnson and Masquat as his

attackers, indicating Johnson had hit him over the head with a baseball bat and Masquat had doused him with gasoline and set him on fire. Webb said the pair had accused him of "messing" with some children, but that was not true.

The highway patrol arrested Johnson and Masquat shortly after the attack. In the bed of Masquat's truck was a baseball bat with blood matching the victim's blood type, a plastic container that tests showed had previously contained gasoline and several empty beer bottles. A cap fitting the plastic gasoline container in the truck bed was found near the site of the attack, as was a beer bottle like the ones found in Masquat's truck. Tests revealed traces of gasoline on Johnson's shorts, and blood, similar to Webb's, on Johnson's shirt. Masquat had blood spots, of the same type as the victim, on his boots and the lower ten inches of his jeans, and singe or burn marks on his shirt.

The State tried Johnson and Masquat separately. At his trial, Johnson's defense was that he had only hit Webb over the head with a baseball bat, but that it was Masquat who had doused Webb with gasoline and set him on fire. Johnson also argued that, in light of his brain damage and low IQ, combined with his having drunk alcohol that night, he was unable to form the requisite intent to kill Webb. The jury rejected these defenses and convicted Johnson of first degree malice murder.

At sentencing, the jury found the two alleged aggravating factors – the murder was especially heinous atrocious or cruel and Johnson was a continuing threat to

society. The jury sentenced Johnson to death. The Oklahoma Court of Criminal Appeals affirmed Johnson's conviction and sentence, *see Johnson v. State*, 928 P.2d 309 (Okla. Crim. App. 1996), and denied post-conviction relief in an unpublished decision.

Johnson then filed a federal habeas petition. Because he filed that petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), that act governs this appeal. *See Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1518 (2000). Johnson, therefore, will not be entitled to habeas relief unless he can establish that the state court determination of his claims was contrary to, or an unreasonable application of, clearly established Supreme Court precedent, *see* 28 U.S.C. § 2254(d)(1), or an unreasonable determination of the facts in light of the evidence. *See id.* § 2254(d)(2). We presume state court factual findings are correct, absent clear and convincing evidence to the contrary. *See id.* § 2254(e)(1). Where the state courts did not address the merits of a habeas claim, we instead review the district court's legal determinations *de novo*, and any factual findings only for clear error. *See Thomas v. Gibson*, 218 F.3d 1213, 1220 (10th Cir. 2000). The district court granted Johnson a certificate of appealability on the following claims. *See* 28 U.S.C. § 2253.

I. Voir dire.

A. Failure to excuse for cause juror who would automatically vote for death sentence. Johnson asserts the trial judge, contrary to *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), failed to excuse for cause prospective juror

Whitely, after she indicated she would automatically vote for death if the jury convicted Johnson of first degree murder. Defense counsel, however, passed Whitely for cause. The Oklahoma Court of Criminal Appeals, therefore, deemed Johnson to have waived this claim. *Johnson*, 928 P.2d at 314.

As cause excusing this default, Johnson now argues that his trial attorney was ineffective for failing to seek Whitely's removal for cause. Johnson, however, never raised this particular ineffective assistance claim in state court, either on direct appeal or in his state post-conviction application. This ineffective-assistance claim, therefore, remains unexhausted and the state courts would now deem it procedurally barred. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 735 n.* (1991); *see also Medlock v. Ward*, 200 F.3d 1314, 1323 (10th Cir.) (recognizing as adequate and independent Oklahoma's procedural bar applicable to ineffective-assistance claims petitioner failed to raise in initial state post-conviction proceedings), *cert. denied*, 121 S. Ct. 197 (2000). As such, this ineffective-assistance claim cannot provide cause excusing Johnson's default. *See Edwards v. Carpenter*, 529 U.S. 446, 120 S. Ct. 1587, 1591-92 (2000). He fails to offer any further cause excusing the default of this ineffective-assistance claim. *See id.* at 1592. Nor does he allege his actual innocence, such that he would meet the fundamental miscarriage of justice exception to his default. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 321 (1995).

Even if we did address this claim's merit, however, it would not warrant habeas relief. Defense counsel exercised a peremptory challenge to remove Whitely. She, therefore, did not sit on Johnson's jury. The loss of that

peremptory challenge alone is insufficient to establish a constitutional deprivation. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Rather, this claim fails because Johnson is unable to show that the twelve jurors who did sit on his jury were other than fair and impartial. *See id.* at 85-86, 88.

B. Failure to excuse two jurors who indicated Johnson should testify if he was innocent. Johnson also challenges the trial court's refusal to remove for cause prospective jurors Miller-Reed and Robertson, who indicated during voir dire that if Johnson was innocent, he should waive his Fifth Amendment privilege and testify. Because Johnson exercised a peremptory challenge to remove Miller-Reed, any error in failing to remove her for cause would again not amount to a constitutional violation. *See id.* at 88. Rather, the sole question here is whether Juror Robertson, who did sit on Johnson's jury, was impartial. *See id.* at 85-86, 88.

Although Robertson did express her belief that Johnson should testify if he was innocent, the trial court later explained in detail Johnson's Fifth Amendment privilege not to testify and the importance of that right. Juror Robertson then stated she understood and that she would follow the court's instructions to the best of her ability.

In refusing to excuse Robertson for cause, the trial court found that she would be impartial. That is a factual finding, *see Patton v. Yount*, 467 U.S. 1025, 1036 (1984), which we presume correct, absent clear and convincing evidence to the contrary, *see* 28 U.S.C. § 2254(e)(1). *See also, e.g., Battenfield v. Gibson*, 236 F.3d 1215, 1224 n.3 (10th Cir. 2001). Further, we afford special deference to the trial

court's finding because it turns on the juror's credibility and demeanor, matters which the trial court is in the best position to assess. *See Patton*, 467 U.S. at 1037 n.12, 1038-40, 1038 n.14; *see also, e.g., Wainwright v. Witt*, 469 U.S. 412, 424-26 (1985).

Here, although Juror Robertson's voir dire answers were equivocal, the trial court, aided by its assessment of her demeanor and credibility, could properly resolve any ambiguity in favor of the State. *See Witt*, 469 U.S. at 434-35 (pre-AEDPA case; presuming correctness of state trial court's factual finding concerning juror's bias, despite any ambiguity in juror's responses, in light of trial court's assessment of juror's demeanor); *see also Moore v. Gibson*, 195 F.3d 1152, 1170 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2206 (2000). Johnson has failed to rebut, by clear and convincing evidence, the trial court's finding that Juror Robertson could "lay aside [her] opinion and render a verdict based on the evidence presented." *Yount*, 467 U.S. at 1037 n.12; *cf. United States v. Bedonie*, 913 F.2d 782, 797-98 (10th Cir. 1990) (affirming, on direct appeal, trial court's finding that juror was impartial, despite juror's beliefs that anyone charged with crime was guilty to some extent, and if a defendant was guilty, he should so plead and forego trial, where juror also subsequently indicated he had formed no opinion as to this particular defendant, he would be willing to base his verdict entirely on evidence heard at trial, and he would be "as fair as [he] could be").

Johnson contends the district court should have held an evidentiary hearing to permit him to prove Juror Robertson's bias. Johnson unsuccessfully sought a state court post-conviction evidentiary hearing, although

apparently not on this issue. Even assuming that 28 U.S.C. § 2254(e)(2) would not now preclude a federal evidentiary hearing, *see Mayes v. Gibson*, 210 F.3d 1284, 1287 n.2 (10th Cir.), *cert. denied*, 121 S. Ct. 586 (2000), Johnson would be entitled to a hearing only "if his allegations, if true and not contravened by the record, would entitle him to habeas relief." *Id.* at 1287. The voir dire record, however, does contravene Johnson's allegations that Juror Robertson was biased. In addition, Johnson fails to indicate what evidence he could now assert, beyond the trial court's voir dire, to prove bias. *See Boyd v. Ward*, 179 F.3d 904, 925 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1188 (2000). The district court, therefore, did not err in denying Johnson a hearing.

C. **Caldwell**[1] ***violation.*** During voir dire, the trial court asked, on a number of occasions, whether, if prospective jurors found the law and evidence warranted the recommendation of a death sentence, they could vote to recommend that penalty. Johnson argues the trial court's use of "recommend" improperly diminished the jury's sense of responsibility for imposing a death sentence, contrary to *Caldwell*. *See also Romano v. Oklahoma*, 512 U.S. 1, 8-9 (1994). He further asserts that the jury's later query, during its deliberations, as to the availability of parole under a life-without-parole sentence, aggravated this improper use of the term "recommend" during voir dire.

The Oklahoma Court of Criminal Appeals rejected these arguments, in light of the trial court's instructions to the jury during sentencing. *See Johnson*, 928 P.2d at 314.

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[1] *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (plurality).

The state appellate court further held that the jury's inquiry, during its deliberations, did not change the *Caldwell* analysis. *See id.* Although we resolve the jury's inquiry in a different manner, we agree that it does not change the *Caldwell* analysis.

To violate *Caldwell*, remarks to the jury must inaccurately describe the role of the jury as provided by state law. *See, e.g., Romano*, 512 U.S. at 9. Oklahoma law does specifically refer to a capital jury's sentencing determination as a "recommendation." Okla. Stat. tit. 21, § 701.11; *see, e.g., Humphreys v. State*, 947 P.2d 565, 570 (Okla. Crim. App. 1997) (holding it was proper statement of Oklahoma law to inform venirepersons that, upon conviction, it would be their duty to determine whether to recommend death); *see also, e.g., Gilson v. State*, 8 P.3d 883, 895 (Okla. Crim. App. 2000) (noting trial court sentenced capital defendant to death according to jury's recommendation); *Bland v. State*, 4 P.3d 702, 709 (Okla. Crim. App. 2000) (same), *cert. denied*, 2001 WL 12990 (U.S. Jan. 8, 2001) (No. 00-7222).

Moreover, the challenged remarks must be considered in light of the trial as a whole. *See Walker v. Gibson*, 228 F.3d 1217, 1243 (10th Cir. 2000); *Moore*, 195 F.3d at 1174. Here, the prosecutor's second-stage opening and closing arguments did not attempt to diminish the jury's responsibility for the sentencing decision and defense counsel's argument reiterated that sentencing was the jury's decision alone. The jury instructions also made clear that it was the jurors' "duty to determine the penalty to be imposed," Trial tr. vol. IV at 720; *see Romano*, 512 U.S. at 9; *Walker*, 228 F.3d at 1243; *Moore*, 195 F.3d at

1174, and did not use any derivation of the term "recommend." In light of the entire record, the state appellate court's determination was not contrary to, nor an unreasonable application of, *Caldwell*. *See* 28 U.S.C. § 2254(d)(1).

II. Jury instructions. Johnson challenges several first-stage jury instructions. He bases these challenges on his defense that, while he was present at the time of the murder and did hit the victim in the head with a baseball bat, it was Masquat who actually killed the victim by pouring gas on him and setting him on fire.

A. Aiding and abetting jury instruction. Due process requires the State to prove beyond a reasonable doubt each element of the charged offense. *See In re Winship*, 397 U.S. 358, 364 (1970). In addition, in order to constitutionally impose a death sentence, under *Enmund v. Florida*, 458 U.S. 782, 797 (1982) and *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987), the State must prove that the petitioner himself killed or attempted to kill the victim, intended that a killing take place or that lethal force be employed; or that the petitioner was a major participant in the felony underlying a felony murder conviction and acted with reckless indifference to human life. *See, e.g., Fox v. Ward*, 200 F.3d 1286, 1294 (10th Cir.), *cert. denied*, 121 S. Ct. 329 (2000); *United States v. McVeigh*, 153 F.3d 1166, 1195 (10th Cir. 1998).

The jury convicted Johnson of malice aforethought, rather than felony, murder. Johnson, nonetheless, argues that, because the first-stage instructions relieved the State of its burden of proving beyond a reasonable doubt that

he possessed the requisite intent to commit malice murder, he is entitled to habeas relief from both his conviction and death sentence. In particular, he challenges instruction No. 9, permitting the jury to convict Johnson either because he committed the murder or because he knowingly aided and abetted Masquat's commission of malice murder, with "a design to commit a crime or to commit acts the probable consequences of which are criminal." Johnson contends this instruction permitted the jury to convict him of first degree murder if it found that he possessed only a general criminal intent, rather than the specific intent to kill Webb.

The Oklahoma Court of Criminal Appeals held the jury instructions, considered as a whole, properly instructed jurors that they had to find that Johnson acted with "malice aforethought" before they could convict him of first degree murder. *See Johnson*, 928 P.2d at 316; *see also id.* at 319 (rejecting *Enmund/Tison* claim). That determination was not contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

The criminal information, read to the jury, charged Johnson with acting in concert with Masquat and "with premeditated design to effect" Webb's death. Instruction No. 1. The trial court further instructed the jury that, in order to convict, it had to find four elements, including that Webb's "death was caused with malice aforethought," Instruction No. 16, defined as the "deliberate intention to take away" another's life, Instruction No. 17. Additionally, the trial court specifically instructed jurors that the State had to prove beyond a reasonable

doubt that Johnson "formed the specific criminal intent of malice aforethought." Instruction No. 11.

It was within this context that the trial court further instructed jurors that

> [a] person concerned in the commission of a crime as a principal is one who directly and actively commits the acts constituting the offense, knowingly and with criminal intent aids and abets in the commission of the offense whether present or not, or advises and encourages the commission of the offense[; and that o]ne who does not actively commit the offense, but who aids, promotes, or encourages its commission, either by act or counsel or both, is not deemed to be a principal to the crime unless he did what he did knowingly and with criminal intent. To aid or abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding in the commission of that criminal offense.

Instruction Nos. 7 and 8.

These instructions, as a whole, clearly tie the aiding and abetting instruction to the specific intent to kill Webb. *See Andrews v. Shulsen,* 802 F.2d 1256, 1274 (10th Cir. 1986) (upholding instruction indicating jury could convict defendant of intentional murder under Utah law for, among other things, intentionally rendering advice during the murder or intentionally helping the murderer escape after the killing, neither of which referred to the necessary intent to kill, where other instructions did require jury to find intent to kill).

Further, the record is sufficient to support the jury's finding that Johnson did act with the intent to kill. *See id.* at 1274-75. Webb identified Johnson as the one who hit him with a baseball bat, and Johnson had Webb's blood on his shirt. Hitting Webb over the head with a baseball bat was part of a murder plan Johnson had accurately foretold in detail several days before the murder occurred. In addition, Johnson had previously made numerous statements about taking care of or getting rid of Webb. The jury instructions, therefore, read as a whole, required jurors to find that Johnson intended to kill Webb before they convicted Johnson of first degree malice murder.

B. Causation instruction. The trial court instructed the jury that

> [n]o person may be convicted of **MURDER IN THE FIRST DEGREE** unless his conduct caused the death of the person allegedly killed. A death is caused by conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life.

Instruction No. 15. Johnson challenges this causation instruction, relying on a comment accompanying this state uniform instruction which "advises this instruction is superfluous where," as here, "the defendant does not dispute the cause of death but argues he is not the perpetrator." *Johnson*, 928 P.2d at 316. The Oklahoma Court of Criminal Appeals rejected this claim, holding that the trial court properly, and simply out of an abundance of

caution, gave this causation instruction because the evidence supported a finding that both Masquat and Johnson directly participated in the murder. *See id.* That determination was not contrary to, nor an unreasonable application of, clearly established Supreme Court authority.

To the extent Johnson is arguing that the trial court violated state law by giving this instruction, he cannot state a federal habeas claim unless he can establish that the erroneous instruction so tainted the trial as to deprive him of due process. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 71-72 (1991). It did not.

Johnson also argues that the causation instruction confused the jury, in light of the trial court's further instruction on Johnson's voluntary intoxication defense. Johnson contends that jurors might have improperly read these instructions together to permit them to convict Johnson of first degree malice murder simply because they may have believed his drinking could have been a substantial factor causing the murder, violating *In re Winship,* and to sentence him to death contrary to *Enmund* and *Tison.* Considered as a whole, however, there is no reasonable likelihood that the jury applied these instructions in a way that violated the Constitution. *See, e.g., McGuire,* 502 U.S. at 72. As discussed previously, the instructions, considered as a whole, clearly required jurors to find that Johnson had acted with the specific intent to kill Webb before they could convict him of first degree malice murder.

III. Trial court's response to jury's inquiry concerning meaning of sentence of life imprisonment without parole. The trial court instructed the jury to consider its sentencing options of death, life imprisonment, and life imprisonment without the possibility of parole. During its deliberations, the jury inquired "We need to know! Is life without parole firm – Does it mean he can *never* be paroled[?]" Trial Court's Ex. # 2 (emphasis in original). The trial court informed the jury that "[i]t is inappropriate for you to consider the question asked." Trial tr. vol. IV. Johnson asserts that the trial court's response violated *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality), which "requires that a capital defendant be permitted to inform his sentencing jury that he is parole ineligible if the prosecution argues," as it did here, "that he presents a future danger," *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997).

A. Retroactive application of **Simmons.** As a threshold matter, the State argues that *Teague v. Lane*, 489 U.S. 288 (1989), bars the retroactive application of *Simmons* to this appeal. *Simmons* does set forth a new rule of law that cannot be used to disturb a death sentence that became final prior to that decision, issued June 17, 1994. *See O'Dell*, 521 U.S. at 153. Johnson's death sentence, however, did not become final until the Oklahoma Court of Criminal Appeals upheld his conviction and sentence on direct review, in August 1996, and the United States Supreme Court denied his petition for certiorari, on October 6, 1997. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Therefore, because Johnson's death sentence was not yet final at the time the Supreme Court decided *Simmons*, there is no retroactivity problem.

B. Merits. In *Simmons,* the trial court instructed the jury on its sentencing options of death or life imprisonment. *See* 512 U.S. at 158-60. Under applicable state law, however, the petitioner could never become eligible for parole. *See id.* at 158 n.2. The Supreme Court held that, where the State argues in a capital sentencing proceeding that the petitioner presents a future threat, due process requires that he be permitted to inform the jury that he is parole ineligible. *See O'Dell,* 521 U.S. at 153; *Simmons,* 512 U.S. at 156.

In this case, on the other hand, the trial court instructed the jury on its three discrete sentencing options available under Oklahoma law – death, life imprisonment and life imprisonment without the possibility of parole. We have held that instructing on these three options, without any further explanation, satisfies *Simmons. See Mayes,* 210 F.3d at 1294. Further, a trial court, in response to a jury's inquiry as to the meaning of a life sentence without parole, may simply refer the jury back to the instructions as given. *See McGregor v. Gibson,* 219 F.3d 1245, 1256 (10th Cir. 2000), *reh'g granted on other grounds.* However, instead of simply referring the jury back to the court's original instructions, "the trial court told the jury it was not appropriate for it to consider whether the defendant could '*never* be paroled.' " *Johnson,* 928 P.2d at 320.

In Oklahoma, "the jury is not to be told of the inner workings of the parole system, even when it must compare two life sentences: one with the possibility of parole, and one without the possibility of parole." *Id.* This, however, does not obviate the need for a correct instruction concerning the three options, including life without

parole. *Simmons*, 512 U.S. at 166. That a state may limit information given to juries about parole does not eliminate the need to inform the jury of parole ineligibilty where future dangerousness is at issue. *Id.* at 168-69.

Although it did not specifically address *Simmons*, the state appellate court correctly held that the trial court's response was error because "the jury must consider the distinctions between life, life without parole and death as it reaches its sentencing decision." *Johnson*, 928 P.2d at 320. The state appellate court, however, deemed this error harmless beyond a reasonable doubt because the trial court's response was, in effect, "non-responsive" to the jury's inquiry and, as a result, had the effect of guiding jurors back to the plain language of the original instruction. *Id.*

It is not entirely clear whether the state appellate court applied *Simmons*. It did not cite *Simmons*, but rather *Mayes v. State*, 887 P.2d 1288, 1318-18 (Okla. Crim. App. 1994). However, it then applied the *Chapman v. California*, 386 U.S. 18, 24 (1967), harmless error test after concluding that the jury was misinstructed. *Johnson*, 928 P.2d at 320. This suggests that federal law including the substance of *Simmons* was applied. If so, we conclude that it was an unreasonable application of harmless error to the *Simmons* error, an error made more apparent by *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001). *See* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). In the alternative, we would review the district court's legal conclusions on the *Simmons* issue de novo and reject them. The district court attempted to distinguish *Simmons* on several grounds, however, we are not persuaded given

that *Simmons* rests upon eliminating a jury's misunderstanding so the jury will not perceive a "false choice" between sentencing to death or a limited period of incarceration when future dangerousness is at issue. *Simmons*, 512 U.S. at 161-62.

In *Shafer*, the jury was instructed that "life imprisonment means until death of the offender," but the trial court, over defense objection, did not instruct "that a life sentence, if recommended by the jury, would be without parole." *Shafer*, 121 S. Ct. at 1269 (internal quotations omitted). Thereafter, the jury sent a note inquiring " '1) Is there any remote chance for someone convicted of murder to become elig [i]ble for parole?' " and " '2) Under what conditions would someone convicted of murder be elig[i]ble?' " *Id.* The trial court responded with " 'Parole eligibility or ineligibility is not for your consideration.' " *Id.*

Although South Carolina maintained that *Simmons* did not apply, the Court extended *Simmons* to situations where the jury's choice is between life without parole and death, even if a third alternative encompassing release is available to the court. *Id.* at 1273. The Court held that "whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that the life sentence carries no possibility of parole." *Id.* The Court recognized that the jury was confused by the absence of such instruction as evidenced by its further question about parole eligibility, and firmly rejected the trial court's response that parole eligibility was not for the jury's consideration.

> The jury's comprehension was hardly aided by the court's final instruction: "Parole eligibility or ineligibility is not for your consideration." That instruction did nothing to ensure that the jury *was* not misled and may well have been taken to mean "that parole *was* available but that the jury, for some unstated reason, should be blind to this fact."

Id. at 1274 (internal citations omitted) (emphasis in original). The "reality [of a life sentence without parole] was not conveyed to Shafer's jury by the court's instructions. . . . "

The same is true here. Contrary to the state appellate court's harmless error analysis, *Johnson*, 928 P.2d at 320, the trial court's instruction that it was inappropriate for the jury to consider parole eligibility did not refer the jury back to the instructions; rather, it plainly contradicted those instructions. The trial court did more than give a non-responsive answer – it told the jury that parole eligibility could not be considered when plainly it could be. At best, the jury had a conflict between the court's instructions as to whether it was proper to consider parole eligibility in imposing sentence. At worst, the jury may very well have thought that parole was available, even with the life without parole option, but for some unknown reason it could not consider that fact.

Harmless error is a mixed question of law and fact. *Hunt v. Oklahoma*, 683 F.2d 1305, 1309 (10th Cir. 1982). Given the need for heightened reliability in determining a capital sentence, we hold that the state appellate court's determination that the instruction was harmless error constitutes an unreasonable application of federal law. 28

U.S.C. § 2254(d)(1). To the extent that the state appellate court did not rely upon *Simmons*, we would conclude that the incorrect instruction "had substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), and cannot be deemed harmless error. Under either approach, *see Bryson v. Ward*, 187 F.3d 1193, 1204-06 (10th Cir. 1999), the judgment of the United States District Court for the Eastern District of Oklahoma must be

REVERSED.

HENRY, J., concurring.

The majority clearly explains the central dilemma in this case: that "the trial court's instruction that it was inappropriate for the jury to consider parole eligibility did not refer the jury back to the [original] instructions" but instead "plainly contradicted those instructions." Slip op. at 21. The majority then correctly applies the Supreme Court's decisions in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001). I therefore join the majority opinion in full.

I write separately only to emphasize that the key to understanding *Simmons* – and therefore *Shafer* – is the concept of "false choice," that is, a choice that may be misleading to the jury. *See* slip op. at 19 (noting that "*Simmons* rests upon eliminating a jury's misunderstanding so the jury will not perceive a 'false choice' "). Notably, this court and several state jurists have made this very point in prior cases. *See, e.g., Mayes v. Gibson*, 210

F.3d 1284, 1294 (10th Cir. 2000) (concluding that there was no *Simmons* violation because "[n]o such false choice was created here" as in *Simmons*); *Booker v. State*, 773 So.2d 1079, 1097-98 (Fla. 2000) (noting that "the spirit of the United States Supreme Court's decision in *Simmons v. South Carolina*" is that "[t]his Court should not be a party to a process that affirmatively misleads a sentencing jury as to the true meaning and effect of the sentencing alternatives presented to it") (Anstead, J., concurring in part and dissenting in part); *State v. Shafer*, 531 S.E.2d 524, 534 (S.C. 2000) (Finney, C.J., dissenting) (noting that "the overriding principle to be drawn from [*Simmons*] is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected"), *overruled by Shafer*, 121 S. Ct. at 1263.

In *Simmons*, a plurality of the Court emphasized repeatedly the false choice confronting the jury in reaching its holding that, "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156 (plurality opinion). For example, the plurality concluded its opinion by stating that "[t]he State may not create a *false dilemma* by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Id.* at 171 (plurality opinion) (emphasis added); *see also id.* at 161 (noting that, "[i]n this case, the jury reasonably may have believed that [the] petitioner could be released on parole

if he were not executed"; adding that, "[t]o the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a *false choice* between sentencing [the] petitioner to death and sentencing him to a limited period of incarceration") (plurality opinion) (emphasis added).

In *Shafer*, the concept of false choice was again highlighted – but this time by a majority of the Court. In its opinion, the majority explicitly stated that *Simmons*'s due process concerns arise when there are " 'misunderstanding[s]' to avoid" or " 'false choice[s]' to guard against." *Shafer*, 121 S. Ct. at 1272 (quoting *Simmons*, 512 U.S. at 161 (plurality opinion)). Because both *Simmons* and *Shafer* invoke false choice in reaching their respective conclusions, I believe that this court's inquiry into *Simmons* properly focuses on this concept.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTER DISTRICT OF OKLAHOMA

MARK DAVID JOHNSON, Petitioner,	)	Case No. CIV-98-331-S
v.	)	(Filed Dec. 09, 1999)
GARY GIBSON, Warden, Oklahoma State Penitentiary, Respondent.	)	

ORDER DENYING WRIT OF HABEAS CORPUS

Petitioner, Mark David Johnson, was convicted following a jury trial, of First Degree Murder in the District Court of Love County, Case No. CRF-91-46, and in accordance with the jury's recommendation, was, on March 18, 1993, sentenced to death. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed his conviction and death sentence. *Johnson v. State*, 928 P.2d 309 (Okla. Crim. App. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 99, 139 L.Ed.2d 54 (1997).

On May 20, 1997, Petitioner filed an Application for Post-Conviction Relief in the Oklahoma Court of Criminal Appeals. The Court denied relief, in an unpublished opinion, on March 24, 1998. Petitioner now seeks relief from his death sentence pursuant to 28 U.S.C. § 2254.

I. RECORDS REVIEWED

This Court has reviewed (1) the Petition for Habeas Corpus; (2) the Response to the Petition filed by the State

of Oklahoma; (3) the Reply to the Response filed by the Petitioner; (4) the transcripts of Jury Trial Proceedings, Volumes I-IV, held on February 8-11, 1193, plus exhibits introduced therein; (5) the transcript of Initial Appearance held on July 29, 1991; (6) the transcript of Motion to Reduce Bond held on August 6, 1991; (7) the transcript of Formal Arraignments and Motion Hearing held on October 17, 1991; (8) the transcript of Motion Hearing and Ex Parte Hearing held on October 30, 1991; (9) the transcript of the Decision as to Ex Parte Hearing for Approval of Defendant's Expert Witnesses held on October 30, 1991; (10) the transcript of the Motion Hearing held on July 30, 1992; (11) the transcript of the Testimony of Shree S. Vinekar, M.D. taken on July 30, 1992; (12) the transcript of a Portion of Trial Management Conference for Rickey Masquat that pertained to Mark Johnson held on October 8, 1992; (13) the transcript of the Trial Management Conference for Mark David Johnson held on January 14, 1993; (14) the transcript of the Sentencing Hearing held on March 18, 1993; (15) the transcript of the jury trial testimony of Kim Lowe, Joseph A. Bridges, Jr., and Carol Lowe taken on February 10, 1993; (16) the transcript of an Informal Announcement held on May 7, 1992; (17) original records from Love County District Court, Case No. CRF-91-46; (18) the Report of the Trial Judge dated May 6, 1993; (19) an Order Granting Rehearing of the Oklahoma Court of Criminal Appeals dated December 24, 1996; (20) the Verified Original Application for Post-Conviction Relief, Request for Evidentiary Hearing and Request for Discovery filed May 20, 1997, including all Appendixes thereto; (21) an Opinion Denying Original Application for

Post-Conviction Relief, Request for Evidentiary Hearing and Motion for Discovery of the Oklahoma Court of Criminal Appeals dated March 19, 1998; (22) and all other records before the Oklahoma Court of Criminal Appeals which were transmitted to this court, including the Brief filed on Petitioner's behalf with the Oklahoma Court of Criminal Appeals in both the direct appeal and the post-conviction appeal, as well as other miscellaneous pleadings. Although not listed specifically, this court has reviewed all other items filed in this case. See Inventory of State Court Record, Docket No. 20, filed on May 28, 1999.

As a result, this court finds that the records, pleadings and transcripts of the state proceedings provide all the factual and legal authority necessary to resolve the matters in the petition and, therefore, an evidentiary hearing is unnecessary. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (*Sumner I*); *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) (*Sumner II*).

II. SUMMARY OF THE FACTS

Historical facts found by the state court are presumed correct, unless the petitioner rebuts the same by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Since Petitioner has failed to rebut the facts, as set forth by the Oklahoma Court of Criminal Appeals, this court hereby adopts the factual findings made by the Oklahoma appellate court.

Thirty-three year old Billy Webb lived with his mother in the Presidential Gardens apartment complex in Norman, Oklahoma. He had mental problems, and acted like a twelve or thirteen year old child. He played with the residents' children, took medication for his mental problems, and often behaved oddly. He stared at people and showed up on their patios and in their garages uninvited. People who knew him believed he was harmless. The apartment manager, Carol Lowe, knew him well, and gave him odd jobs around the complex.

On July 23, 1991 Mark David Johnson, who lived at the complex and worked there as the painter, told Lowe that if he thought Webb was going to hurt her children he would "take a baseball bat to him, pour gas on him and throw a match on him." Johnson had made a similar statement to Lowe's husband. The next day Johnson told several co-workers that if they couldn't do anything about Webb, he could.

The next evening Webb held the flashlight while one of the tenants and her boyfriend put mud flaps on her truck. When the job was done, Webb told them he was going to go out and party. He left in an orange and white Chevrolet pickup with Mark David Johnson and Rickey Masquat. [FN1] The next morning around 6:30 a.m. a motorist saw Webb standing naked in the middle of the Putnam Road near Marietta in Love County. The motorist thought Webb was covered with mud. He called the Love County Sheriff, and Deputy Kenny Walker came to the site and heard Webb calling to him from tall grass by the side of the road. Webb was bleeding from a head wound, and his skin hand been

burned off. He told Walker that "Mark" hit him over the head with a baseball bat, and "Rickey" poured gasoline on him from a plastic jug and set him on fire. Webb also told him the men were headed to Dallas in a 1973 or 1974 orange and white Chevrolet pickup truck. Unknown to Deputy Walker, Johnson and Masquat had been contacted by the Highway Patrol earlier that morning as they walked away from their orange and white Chevrolet pickup that was stuck in the median of I-35 with a flat tire. The Trooper offered to call a wrecker, but when the men stated they wanted to call home, they were taken to the Chickasaw Trading Post. As a result of radio contact between the Sheriff's office and the Highway Patrol, Johnson and Masquat were arrested at the trading post.

FN1. Masquat was tried separately, convicted and sentenced to life imprisonment without possibility of parole. Judgment and sentence was affirmed by unpublished opinion. *Masquat v. State,* (F-93-1369; July 26, 1996).

The Trooper noticed blood on Johnson's sleeve and Johnson explained the blood came from the bloody nose he got when the truck hit the ditch. A bloody baseball bat, and a plastic jug with traces of gasoline was found in the bed of the truck. Forensic examination established the blood on the bat and shirt was consistent with Webb's blood. Johnson's shorts had gasoline on them. A plastic cap which fit the jug perfectly was found at the site where Webb was burned.

Webb lived for approximately seventeen hours after being burned. He was treated at the scene, at the Love County Health Center, at

> Ardmore Memorial Hospital, and at the Hillcrest Burn Center in Tulsa. He remained lucid until his death, his pain minimized by the fact the nerves in his skin had been burned away. During this time he was able to communicate, for he rejected sedatives in the hope he would be able to talk with his mother before he died.
>
> Webb told the paramedic who treated him at the scene, "Rick and Mark, my friends" had done this to him. When the paramedic asked why they did it, Webb replied, "They say I messed with some kids and I didn't do that." Webb told a Tulsa Police Detective the same thing he told Deputy Walker, Mark hit him with the bat and Rick soaked him with gasoline and set him on fire.

Johnson v. State, 928 P.2d 309, 313-314 (Okla. Crim. App. 1996).

III. PETITIONER'S CLAIMS FOR RELIEF

In his Petition filed herein on February 1, 1999, Petitioner raises seven (7) propositions of error. Respondent filed a Response to the Petition by and through the Attorney General of the State of Oklahoma. Specifically, Petitioner asserts the following errors entitle him to release from custody: (1) his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated during the jury selection process; (2) his Fifth, Eighth and Fourteenth Amendment rights were violated by the first stage jury instruction process; (3) the second stage jury instructions violated Petitioner's Fifth, Eighth and Fourteenth Amendment rights; (4) the trial court improperly admonished the jury that it was "inappropriate" for them to

consider whether Petitioner could ever be paroled if sentenced to "life without parole"; (5) prosecutorial misconduct; (6) ineffective assistance of counsel; and (7) a conflict of interest sanctioned and imposed by the State of Oklahoma violated Petitioner's Sixth, Eighth and Fourteenth Amendment rights.

Most of these claims were raised on direct appeal and decided, on the merits, by the Oklahoma Court of Criminal Appeals. Some of these claims, however, were raised for the first time in the state's post-conviction proceedings.[1] All issues presented herein, with the exception noted in footnote 3, appear to have been properly exhausted.

IV. STANDARD OF REVIEW

Since Petitioner's request for counsel herein was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Petitioner concedes that the AEDPA applies to this action. Accordingly, this court holds that the AEDPA is applicable and should be applied herein.

The AEDPA made significant changes to federal habeas corpus law, specifically delineating the circumstances under which a federal court may grant habeas relief. Title 28, Section 2254(d) now provides:

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[1] The Oklahoma Court of Criminal Appeals addressed issues 1, 2, 3, 4 and 5 on the merits in Petitioner's direct appeal. The remaining issues, with the exception of one allegation of ineffective assistance of counsel, were first raised in Petitioner's post-conviction proceedings.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Tenth Circuit has recognized that the AEDPA increases the deference to be paid to a state court's factual findings and legal determinations. *Houchin v. Zavaras*, 107 F.3d 1465 (10th Cir. 1997). See also, *Ford v. Ahitow*, 104 F.3d 926, 936 (7th Cir. 1997) and *Thompson v. Cain*, 161 F.3d 802, 805 (5th Cir. 1998).

Petitioner argues in both his Reply brief and in a separate brief filed in support of a request for this Court to hold any decision herein in abeyance pending a decision by the United States Supreme Court in *Williams v. Taylor*, 119 S.Ct. 1355 (cert. granted April 5, 1999),[2] that the meaning of the terms employed in § 2254(d), and therefore the actual review standard applicable to federal habeas cases, have never been addressed by the United

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[2] Docket Nos. 24 and 27, respectively.

States Supreme Court. The Tenth Circuit recognizes, however, that "review of a denial of habeas corpus relief is subject to two different types of analysis depending on whether a claim was heard on its merits by the state courts." *Moore v. Gibson*, 1999 WL 765893, *7 (10th Cir. 1999). Where the claim was not heard on the merits by the state courts, the Tenth Circuit reviews "the district court's conclusions of law de novo and its findings of fact, if any, for clear error." *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999). Where, however, the claim was adjudicated, by the state courts, on its merits, a petitioner is not entitled to federal habeas relief unless he can show "that the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). As a result, on October 28, 1999, this Court overruled Petitioner's motion to hold this decision in abeyance.[3]

Additionally, the Tenth Circuit has held the AEDPA "increases the deference afforded to state court adjudications." *Moore v. Gibson, supra*. Determinations of factual issues made by state courts are presumed correct and a habeas petitioner must rebut the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

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[3] Docket No. 29.

V. JURY SELECTION

In his first proposition, Petitioner alleges his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated during the jury selection process. Specifically, Petitioner argues that the Oklahoma courts failed to obey the United States Supreme Court's holding in *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), by not excusing for cause a potential juror who had stated unequivocally that she would vote for death if Petitioner were convicted of murder in the first degree. Second, Petitioner argues the court failed to obey the United States Supreme Court's holding in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), by not excusing for cause two potential jurors who indicated they would presume Petitioner was guilty of the offense if Petitioner did not testify. Finally, Petitioner alleges that the Oklahoma courts failed to obey the United States Supreme Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), by impermissibly leading the jury to believe that the responsibility for infliction of the death penalty rested with someone other than the jury. Each of these claims were raised on direct appeal.

A. Challenge to Juror Whiteley

Petitioner initially argues the trial court violated Supreme Court law when it did not excuse for cause Juror Whiteley when she unequivocally stated "that she would vote for death, and only death, if Petitioner Johnson were convicted of murder in the first degree." While Petitioner's trial attorney passed Juror Whiteley for cause, he

exercised his seventh peremptory challenge to excuse Juror Whiteley from the jury panel (J.T. Tr. Vol. II, at p. 279).

In considering this issue on direct appeal, the Oklahoma Court of Criminal Appeals held the defense had waived any appellate argument regarding Juror Whiteley by passing her for cause at trial. *Johnson v. State*, 928 P.2d 309, 314 (Okla. Crim. 1996). Petitioner, citing *Morgan v. Illinois*, 504 U.S. 719, 728, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), argues that "a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause," and therefore, Juror Whiteley should have been disqualified for cause by the trial court. Since Juror Whiteley was not excused for cause, Petitioner seems to be arguing that his constitutional right to a fair and impartial jury was impaired. Although Petitioner concedes that this claim was waived under state law for failure to object at trial, Petitioner argues his procedural default should have been excused due to ineffective assistance of trial counsel.[4]

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[4] Petitioner did raise a claim of ineffective assistance of appellate counsel during post-conviction review, but that claim was based upon other factual allegations. No ineffective assistance of counsel claim has ever been raised in state court in relation to the jury selection process. See Verified Original Application for Post-Conviction Relief, Request for Evidentiary Hearing and Request for Discovery and Appendix I, Application for Post-Conviction Relief Arguments and Authoritity (sic) filed in the Oklahoma Court of Criminal Appeals on May 20, 1997. Therefore, this issue is has not been exhausted. Since this claim would be procedurally barred if raised in a second application for post-conviction relief, 22 O.S. Supp. 1995, § 1089.1, it would be an act of futility to dismiss this

In *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the United States Supreme Court addressed a situation identical to the present case. During the jury selection, Petitioner Ross utilized one of his peremptory challenges to remove a juror who should have been excluded by the trial court under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). On appeal, Ross argued his conviction and sentence of death should be reversed due to the trial court's failure to follow *Witherspoon* and excuse the juror for cause. In rejecting Ross' argument, the court held that even though the Petitioner was required to exercise a peremptory challenge to cure the trial court's error, the loss of a peremptory challenge did not constitute the violation of the constitutional right to an impartial jury. *Ross v. Oklahoma, supra*, U.S. at 88, S.Ct. at 2278. Rather, the Court found that any claim that the jury was not impartial should focus not on the excused juror, but on the jurors who ultimately sat. *Id.*, U.S. at 86, S.Ct. at 2277.

In this case, Petitioner does not argue that the jurors who ultimately sat were impartial. Therefore, even if this court were to overlook the procedural bar[5], Petitioner

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case to give Petitioner an opportunity to exhaust this claim. Accordingly, this particular claim is procedurally barred. *Steele v. Young*, 11 F.3d 1518, 1524 (10th Cir. 1993).

[5] When dealing with claims of ineffectiveness of counsel, courts have been reluctant to apply a state procedural bar unless the state procedure in question adequately protects a criminal defendant's ability to vindicate their constitutional right to effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In *English v. Cody*, 146 F.3d 1257, 1262 (10th Cir. 1998), the Court held Oklahoma's bar

could not prevail on his challenge to the trial court's failure to excuse Juror Whiteley for cause. Accordingly, this claim is without merit.

B. Challenge to Prospective Jurors Robertson and Miller-Reed

Next, Petitioner argues the trial court erred in failing to remove two jurors who expressed their opinion that Petitioner should testify if he was innocent. Defense counsel ultimately excused one of these jurors, Juror Miller-Reed, with his fourth peremptory challenge. One of these jurors (Juror Robertson), however, sat on Petitioner's jury. For the reasons discussed in subsection V(A) above, this Court finds no constitutional violation occurred in defense counsel having to exercise a peremptory challenge to excuse Juror Miller-Reed.

In rejecting this claim on direct appeal, the Oklahoma Court of Criminal Appeals found:

> After Miller-Reed and Robertson expressed their opinion that the [petitioner] should testify if he was innocent, the trial court explained the [petitioner's] Fifth Amendment right to silence, and admonished these veniremen they would be instructed not to consider the defendant's silence at all. When the trial judge asked if they could follow this law, they replied they could.

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would apply if trial and appellate counsel differ and the ineffectiveness claim can be resolved upon the trial record alone. Both of these factors are present in Petitioner's case.

> This Court will reverse the decision of a trial court regarding jury selection only if that decision rises to an abuse of discretion. *Id.* at 277. A trial judge commits an abuse of discretion when the judge's decision is not supported by the law or the facts of the case. *Walker v. State*, 780 P.2d 1181, 1183 (Okla. Cr. 1989). Excusal for cause is justified when, among other things, a juror cannot try the issue impartially, and without prejudice to the substantial rights of the party challenging the juror. See 22 O.S. 1991, § 659. When the two veniremen agreed to follow the law as set forth by the judge, they no longer prejudiced the substantial Fifth Amendment right of the [petitioner]. Therefore, the trial court's decision to deny the challenge for cause is within the proper exercise of his discretion.

Johnson v. State, 928 P.2d 309, 314 (Okla. Crim. App. 1996). Respondent asserts the Oklahoma Court of Criminal Appeals decision was not contrary to federal law and therefore, pursuant to 28 U.S.C. § 2254(d)(1), should be upheld.

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Supreme Court clarified its decision in *Witherspoon* and reaffirmed the standard adopted by *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Under that standard, the trial court must determine "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt, supra*, U.S. at 424, S.Ct. at 852. A trial judge's decision of a potential juror's bias is a factual finding which is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). *Davis v. Executive Dir.*

of Dep't of Corrections, 100 F.3d 750, 777 (10th Cir. 1996), *cert. den., Davis v. Zavaras*, 520 U.S. 1215, 117 S.Ct. 1703, 137 L.Ed.2d 828 (1997). Review of a trial judge's determinations regarding a juror's willingness and/or ability to follow the law as instructed by the court is quite deferential since what is being inquired into is a state of mind which may turn largely on assessments of demeanor and credibility, matters peculiarly within the province of the trial judge. *United States v. Tipton*, 90 F.3d 861, 880 (4th Cir. 1996). Additionally, such credibility findings can not be easily discerned from an appellate record. *Wainwright v. Witt, supra*, U.S. at 429, S.Ct. at 854.

After reviewing the entire voir dire, including not only the suggestive questions asked by defense counsel, but also the clarifying questions asked by the trial judge after defense counsel had completed questioning the jurors, this Court finds nothing to support Petitioner's assertion that Juror Robertson would not obey the court's instructions that she could "not consider it at all detrimental to [Petitioner]" if he chose not to testify (J.T. Vol. I, at p. 118). While Juror Robertson did at one point during voir dire say that she felt Petitioner should testify if he was not guilty, after another juror said he did not think that it showed guilt or a greater degree of guilt if Petitioner did not testify and that the State should have to prove guilt beyond a reasonable doubt, Ms. Robertson indicated she felt the same way. *Id.*, at pp. 102-105. Thereafter, the trial court explained the Fifth Amendment right to the potential jurors, stating: "As a matter of fact, I will instruct you that the law is that you may not consider it at all detrimental to him if he chooses not to testify." *Id.*,

at pp. 117-118. Juror Robertson indicated she would follow that instruction to the best of her ability. *Id.* Accordingly, this Court finds Petitioner has failed to rebut the presumption of correctness accorded to the trial judge's determination regarding the ability of Juror Robertson to follow the law as instructed by the court. Therefore, this Court finds Petitioner is not entitled to relief on this issue.

C. Trial Court's Instructions during Jury Selection

Finally, Petitioner alleges his constitutional rights were violated when the trial court "impermissibly led the jury to believe that responsibility for infliction of the death penalty" was with someone other than the jury. Respondent again asserts the Oklahoma Court of Criminal Appeals decision is not contrary to clearly established federal law.

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985), the Court found it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." In *Darden v. Wainwright*, 477 U.S. 168, 184, n. 15, 106 S.Ct. 2464, 2473, n. 15, 91 L.Ed.2d 144 (1986), the Court held that *Caldwell* was "relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Thus, as the Court recognized in *Romano v. Oklahoma*, 512 U.S. 1, 8, 114 S.Ct. 2004, 2010, 129 L.Ed.2d 1

(1994), "to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." (citing *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989).

In considering this claim on direct appeal, the Oklahoma Court of Criminal Appeals, following its earlier decision in *Romano v. State*, 847 P.2d 368 (Okla. Crim. App. 1993), stated: "In *Romano* the trial court's use of the word, "recommend" in voir dire was not error where the proper and complete sentencing instructions were given in the second stage of trial. *Id.* at 390." *Johnson v. State*, 928 P.2d 309, 314 (Okla. Crim. App. 1996). Further, in considering this issue, it is essential to keep in mind that the trial court's question to the prospective jurors regarding whether they could, upon a finding of guilt, recommend the death penalty is a proper statement of Oklahoma law. See *Romano v. State, supra.* See also, 21 O.S. 1991, §701.11, 22 O.S. 1991, §§ 961 *et seq.*, and §§ 1001 *et seq.*

Since no misstatement of law resulted from the trial court's questions to the jury, this Court finds no *Caldwell* error occurred. Further, after considering the explicit instructions which were given in the second stage of trial,[6] this Court finds nothing in the questions by the trial court which would have diminished the jury's sense of the "awesome responsibility"[7] being undertaken.

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[6] J.T. Vol. IV, at pp. 720-725. O.R., at pp. 789-801.

[7] *Caldwell v. Mississippi*, 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231 (1985).

Therefore, this Court finds that the decision of the Oklahoma Court of Criminal Appeals was not contrary to federal law, 28 U.S.C. § 2254(d)(1). Accordingly, this claim is denied.

VI. JURY INSTRUCTIONS

In his second proposition, Petitioner challenges the jury instructions given during the first stage of trial. Specifically, Petitioner alleges the trial court's aiding and abetting instructions impermissibly allowed the jury to convict him of malice aforethought murder without any evidence that Petitioner intended the death of the victim. Petitioner also asserts that the trial court's failure to instruct the jury to make individualized culpability findings violated federal constitutional law. Finally, Petitioner argues the instructions on causation negated an essential element of criminal intent.

In his third proposition, Petitioner challenges the jury instructions given during the second stage of trial. In particular, Petitioner challenges the constitutionality of both the "especially heinous, atrocious or cruel" aggravating circumstance and the "continuing threat" aggravating circumstance. Petitioner also challenges as unconstitutional the anti-sympathy instruction given during the first stage of trial, but incorporated by reference into the second stage of trial. Petitioner further claims the trial court's instructions allowed the sentencing jury to ignore mitigating evidence, thereby rendering his sentence of death unconstitutional. Next, Petitioner asserts that the trial court erred in failing to instruct the jury that its findings regarding mitigating circumstances did not

have to be unanimous. Finally, Petitioner alleges the jury was improperly instructed regarding the burden of proof for weighing aggravating and mitigating circumstances. All of these jury instruction claims were raised in Petitioner's direct appeal and addressed on the merits by the Oklahoma Court of Criminal Appeals. Therefore, this Court finds these claims have been exhausted for purposes of federal habeas review.

As a general rule, improper jury instructions do not form the basis for federal habeas corpus relief. *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). In attempting to set aside a state conviction based on an erroneous jury instruction, a § 2254 petitioner has a heavy burden. Ordinarily, such errors are not reviewable in a federal habeas proceeding, "unless they are so fundamentally unfair as to deprive petitioner of a fair trial and to due process of law." *Nguyen v. Reynolds*, 131 F.3d 1340, 1357 (10th Cir. 1997) (citing *Long v. Smith*, 663 F.2d 18, 23 (6th Cir. 1981)).

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", *Cupp v. Naughten*, 414 U.S., at 147, 94 S.Ct., at 400, 38 L.Ed.2d 368, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,' " *id.*, at 146, 94 S.Ct. at 400.

Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977) (footnote omitted).

Issues regarding whether a jury was properly instructed are questions of law. *United States v. Voss*, 82 F.3d 1521 (10th Cir. 1996). Accordingly, this Court must decide whether the Oklahoma court's decision regarding jury instruction issues was "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

A. First Stage Jury Instructions

1. Aiding and Abetting Instructions

First, Petitioner argues the aiding and abetting instructions given at his trial allowed the jury to convict him of Malice Aforethought Murder without a showing that Petitioner intended the death of the victim. Petitioner relies upon *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), for the proposition that Fourteenth Amendment due process requires a conviction to rest on proof beyond a reasonable doubt of every essential element of the crime charged. Basically, Petitioner argues the aiding and abetting instruction negated the specific intent element by allowing the jury to find Petitioner guilty if he had aided and abetted the co-defendant in the killing.

Under *Jackson*, the critical inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*, U.S. at 319, S.Ct. at 2789. Prior to the adoption of the AEDPA, the Tenth Circuit treated a habeas claim

challenging the sufficiency of the evidence under *Jackson* as a question of law. See, *e.g., Romano v. Tansy*, 46 F.3d 1024, 1032 (10th Cir. 1995). In *Bryson v. Ward*, 1999 WL 590738, however, the Tenth Circuit treated a post-AEDPA claim raising the question of whether there was sufficient evidence to instruct the jury on a lesser included offense as a question of fact.

Clearly, under the AEDPA, if the sufficiency of the evidence is treated as a question of law, this Court must decide if the Oklahoma Court of Criminal Appeals unreasonably applied the "rational factfinder" standard adopted in *Jackson*. 28 U.S.C. § 2254(d)(1). If, however, the sufficiency of the evidence is treated as a question of fact, this Court must decide if the Oklahoma courts decision was based upon an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). See also, *Moore v. Gibson*, 1999 WL 765893, *22-23 (10th Cir. 1999). In addition, 28 U.S.C. § 2254(e)(1) requires this Court to accord a presumption of correctness to the state court's actual determinations, unless the petitioner has rebutted the same with clear and convincing evidence. After reviewing the record herein, as well as the Oklahoma court's decision, this Court finds that Petitioner's claim would fail under either analysis.

Specifically, in considering this issue on direct appeal, the Oklahoma Court of Criminal Appeals held:

> The Oklahoma Uniform Jury Instructions regarding aiding and abetting were given in this trial. See OUJI-CR 204, 205, 206, 207 and 208. Defense counsel did not object to these instructions, and thus waived all but plain error. *Munson v. State*, 758 P.2d 324, 332 (Okl. Cr. 1988), *cert.*

> *denied*, 488 U.S. 1019, 109 S.Ct. 820, 102 L.Ed.2d 809 (1989). [Petitioner] argues these instructions allowed the jury to substitute the general criminal intent necessary to find aiding and abetting for the specific intent to kill required to prove malice aforethought, an element of first degree murder.
>
> The instructions as a whole do not support this argument. The jury was clearly and correctly instructed on (1) the malice aforethought element of murder in the first degree, (2) the definition of malice aforethought as the deliberate intent to take a human life, and (3) the State's burden to prove beyond a reasonable doubt that the defendant formed the specific criminal intent of malice aforethought. These instructions sharply channel the jury's discretion. While it could find the defendant aided and abetted in the murder by finding a design to commit the crime, it could convict for first degree murder only after finding a specific intent to kill beyond a reasonable doubt.

Johnson v. Gibson, 928 P.2d 309, 315-316 (Okla. Crim. App. 1996).

While Petitioner specifically challenges the jury instructions regarding aiding and abetting, this Court must consider the instructions as a whole in determining whether the jury was adequately informed of the law in Oklahoma. *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973). First the aiding and abetting instructions provided the following directions to the jury:

Instruction No. 7

All persons concerned in the commission of a crime are regarded by the law as principals and are equally guilty thereof. A person concerned in the commission of a crime as a principal is one who directly and actively commits the acts constituting the offense, knowingly and with criminal intent aids and abets in the commission of the offense whether present or not, or advises and encourages the commission of the offense.

Instruction No. 8

Merely standing by, even if standing by with knowledge concerning the commission of a crime, does not make a person a principal to a crime. Mere presence at the scene of a crime, acquiescence in its commission, without participation, does not make a person a principal to a crime.

One who does not actively commit the offense, but who aids, promotes, or encourages its commission, either by act or counsel or both, is not deemed to be a principal to the crime unless he did what he did knowingly and with criminal intent. To aid or abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding in the commission of that criminal offense.

Instruction No. 9

"CRIMINAL INTENT" means a design to commit a crime or to commit acts the probable consequences of which are criminal.

O.R. 766-768.

Next, the jury was advised that:

Instruction No. 16

No person may be convicted of MURDER IN THE FIRST DEGREE unless the state has proved beyond a reasonable doubt each element of the crime. These elements are:

First, The death of a human;
Second, The death was unlawful;
Third, The death was caused by the Defendant;
Fourth, the death was caused with malice aforethought.

O.R. 775.

Additionally, Instruction No. 17 informed the jury that:

"MALICE AFORETHOUGHT" means a deliberate intention to take away the life of a human being. As used in these instructions, "MALICE AFORETHOUGHT" does not mean hatred, spite or ill-will. The deliberate intent to take a human life must be formed before the act and must exist at the time a homicidal act is committed. No particular length of time is required for formation of this deliberate intent. The intent may have been formed instantly before commission of the act.

O.R. 776.

The jury was also advised that:

It is the burden of the State to prove beyond a reasonable doubt that the Defendant formed the specific criminal intent of malice

> aforethought, an element of the crime of Murder in the First Degree. If you find that the State has failed to sustain that burden, by reason of the Defendant's intoxication, then the Defendant must be found not guilty of that particular crime.

O.R. 770, Instruction No. 11.

Since the jury was specifically advised that they were required to find that the State had proved beyond a reasonable doubt that the death was caused with malice aforethought, this Court finds nothing within the aiding and abetting instructions which negated the jury's responsibility to find that Petitioner possessed the requisite criminal intent to kill the victim at the time of the attack. Further, based upon the evidence in the record below, this Court finds sufficient evidence to establish that a "rational trier of fact" could have found proof of Petitioner's guilt beyond a reasonable doubt.

The procecution's uncontradicted evidence established that Petitioner, on more than one occasion, shortly before the attack occurred, stated that if he thought the victim was going to hurt children, he would "take a baseball bat to him, pour gas on him and throw a match on him." *Johnson v. State*, 928 P.2d 309, 313 (Okla. Crim. App. 1996). Petitioner also "told several co-workers that if they couldn't do anything about [the] victim], he could." *Id.* Additionally, after the attack, Petitioner did not seek medical attention for the severely burned victim. Rather, Petitioner abandoned the victim on a country road. Clearly, these facts provided sufficient circumstantial evidence for a reasonable jury to conclude that Petitioner intended the death of the victim.

Therefore, this Court finds that the decision of the Oklahoma Court of Criminal Appeals is not contrary to clearly established federal law. Further, based upon the facts as they appear from the record herein, this Court finds the decision of the Oklahoma Court of Criminal Appeals decision is not based on an unreasonable determination of the facts below. Therefore, pursuant to 28 U.S.C. § 2254(d), Petitioner is not entitled to relief on this claim.

2. Applicability of *Enmund* and *Tison*

In addition, Petitioner argues that the giving of aiding and abetting instructions violated his constitutional right to individualized culpability findings as required by *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1986). In *Enmund*, the defendant was convicted of felony-murder (the unlawful killing occurring during the perpetration of or in the attempted perpetration of robbery). The sole issue decided by the Court was "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." *Id.*, at U.S. 787, at S.Ct. 3371. Unlike the facts in *Enmund*, the evidence in Petitioner's trial indicated Petitioner stated, shortly before the attack of the victim, what Petitioner would do if he thought the victim had hurt any children and Petitioner told co-workers he could take care of the victim (J.T. Vol. III, at pp. 7, 16, 25 and 27); the attack of the victim was carried out in the same manner as that described by Petitioner's statements; the victim

stated Petitioner hit him with a baseball bat (J.T. Vol. II, at pp. 367-368 and Vol. III, at p. 455); and Petitioner's clothes had gasoline on them (J.T. Vol. III, at p. 580). Clearly, these facts establish Petitioner's personal involvement was significant.

Similarly, in *Tison*, the defendants were convicted of felony-murder. Again, there was no evidence the Tison brothers took any act intended to kill. The issue, therefore, became whether the Eighth Amendment prohibited a death sentence where the defendants' participation, combined with a reckless indifference to human life, was sufficient to satisfy the culpability requirements of *Enmund*. Unlike *Enmund*, the defendants' personal involvement, in *Tison*, was described by the Court as "substantial." The Court held that:

> the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Tison v. Arizona, 481 U.S. 137, 157-158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1986).

Here, Petitioner was convicted of Malice Aforethought Murder, not felony-murder. As discussed above, the jury, reading the instructions as a whole, could not have found Petitioner guilty without finding that he possessed the requisite intent to kill. Therefore, since the jury had to have found that the Petitioner intended to kill the victim and caused the victim's death, no instructions

under either *Enmund* or *Tison* were required. Accordingly, this Court finds the decision of the Oklahoma Court of Criminal Appeals was not contrary to clearly established federal law. 28 U.S.C. § 2254(d)(1). Further, this Court finds the adjudication of this claim did not involve an unreasonable determination of the facts in light of the evidence presented at trial. 28 U.S.C. § 2254(d)(2). Therefore, Petitioner is not entitled to relief herein.

3. Causation instruction.

Finally, Petitioner argues that the trial court's instruction on "causation" created confusion. Therefore, Petitioner argues his constitutional rights were violated.

To support this argument, Petitioner relies upon the Commission Comments to the Oklahoma Uniform Jury Instructions. Those comments provide:

> In cases where the defendant does not dispute that certain conduct alleged forms the legal cause of the victim's death, but claims instead that he is not the perpetrator of the crime . . . or raises an affirmative defense, the general causation instruction is superfluous and potentially confusing, and should not be given.

Oklahoma Uniform Jury Instructions – Criminal, Oklahoma Center for Criminal Justice (1981), p. 66.

In this case, Petitioner argues the confusion is evident. Specifically, Petitioner argues since there was evidence of Petitioner's voluntary intoxication, the jury was instructed on the defense of voluntary intoxication. Because the jury may have believed Petitioner's intoxication was a "substantial factor in bringing about the

death" of the victim, Petitioner argues the "causation" instruction negated the essential element of criminal intent.

The challenged "causation" instruction provided:

> No person may be convicted of MURDER IN THE FIRST DEGREE unless his conduct caused the death of the person allegedly killed. A death is caused by conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life.

O.R. 774, Instruction No. 15.

Additionally, the voluntary intoxication instructions provided:

Instruction No. 10

> Evidence has been introduced of intoxication of the Defendant as a defense to the charge that the Defendant has committed the crime of Murder in the First Degree.

Instruction No. 11.

> It is the burden of the State to prove beyond a reasonable doubt that the Defendant formed the specific criminal intent of malice aforethought, an element of the crime of Murder in the First Degree. If you find that the State has failed to sustain that burden, by reason of the Defendant's intoxication, then the Defendant must be found not guilty of that particular crime.

Instruction No. 12-

You are instructed for the defense of volunatary [sic] intoxication, the following definitions apply:

Incapable of forming specific criminal intent – The state in which one's mental powers have been overcome through intoxication, rendering it impossible to form a criminal intent.

Intoxication – A state in which a person is so far under the influence of an intoxicating liquor, drug, or other substance that his or her passions are visibly excited or his or her judgment is impaired.

O.R. 769-771.

In addressing this issue on direct appeal, the Oklahoma Court of Criminal Appeals found:

> [Petitioner] does not dispute the evidence is sufficient to prove he hit Webb over the head with a baseball bat and caused a three inch gash. He based his defense on the fact Webb died from thermal injuries, not from the blow to the head, and he did not set Webb on fire. Because the evidence indicated Johnson and Masquat both participated in the murder, the trial court properly exercised its discretion by using an abundance of caution in instructing the jury on causation. We also note trial counsel was satisfied with this instruction and did not object. Only plain error thus is preserved for appellate review, and we find no error at all.

Having thoroughly reviewed the instructions as a whole, this Court finds that the challenged "causation" instruction did not create confusion or detract from the

instructions which required the jury to find criminal intent. Accordingly, this Court finds no error which rises to the level of a constitutional violation. Thus, Petitioner's claim is hereby denied.

B. Second Stage Jury Instructions

1. "Especially heinous, atrocious or cruel" aggravating circumstance

In his third proposition, Petitioner argues that Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance is "unconstitutionally vague and overly broad on its face and as construed by the Oklahoma Court of Criminal Appeals." Additionally, Petitioner argues that this aggravating circumstance is unconstitutionally vague and overly broad as applied in this particular case. Since this issue was raised by Petitioner on direct appeal and addressed on the merits by the Oklahoma appellate court, Respondent concedes that the claim has been exhausted for purposes of federal habeas review. Respondent argues, however, that Petitioner has failed to establish that the state court's decision on this issue violates Supreme Court law, and therefore, the claim should fail under 28 U.S.C. § 2254(d)(1).

In considering this issue on direct appeal, the Oklahoma Court of Criminal Appeals said the aggravator as "not arbitrary or capricious, and does not run afoul of the Eighth Amendment of the federal constitution." *Johnson v. State*, 928 P.2d 309, 316 (Okla. Crim. App. 1996).

Instruction No. 5 provided:

> As used in these instruction, the term "HEINOUS" means extremely wicked or shockingly evil; "ATROCIOUS" means outrageously wicked and vile; "CRUEL" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious abuse.

O.R. 794.

Initially, Petitioner argues that this aggravating factor, as defined by Oklahoma statutes, simply remains unconstitutionally vague and overly broad and fails to genuinely narrow the class of defendants eligible for the death penalty. The Tenth Circuit Court of Appeals has, however, consistently rejected vagueness challenges on the face of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. *Duvall v. Reynolds*, 139 F.3d 768, 794 (10th Cir. 1998), *cert denied*, ___U.S.___, 119 S.Ct. 345, ___ L.Ed.2d ___ (1998); *Hatch v. State*, 58 F.3d 1447, 1468-1469 (10th Cir. 1995), *cert. denied*, 517 U.S. 1235, 116 S.Ct. 1881, 135 L.Ed.2d 176 (1976); and *Cooks v. Ward*, 165 F.3d 1283, 1290 (10th Cir. 1998).

Next Petitioner argues the instruction as given and applied in his case is unconstitutionally vague. Petitioner argues that the constitutional violations which arose from Oklahoma's definition of this aggravating factor (which, as just discussed, the Tenth Circuit does not recognize as a constitutional violation) were compounded when the

trial court deleted the word "physical" from the "serious physical abuse" portion of the limiting second paragraph. Petitioner argues omission of the word "physical" from the definition resulted in a "material misrepresentation to the jury of the law." This error, however, could simply have been a scrivener's error, especially where Petitioner's counsel did not object to the language employed.

When considering this issue on direct appeal, the Oklahoma Court of Criminal Appeals stated:

> In this sensitive area of capital sentencing, we are constrained to find deviation from the well-established and constitutionally firm instruction is error. We are not persuaded, however, that the error dramatically lessened, or indeed lessened at all the standard of proof which the jury had to apply to find this aggravator.
>
> From a practical semantic standpoint, when we compare the phrase "serious physical abuse", with the phrase "serious abuse", we find the term "physical" does not address the degree of suffering required to satisfy the limitation. Rather, it addresses the type of harm which may satisfy this aggravating circumstance. In contrast, the degree of suffering is addressed by both of the words which frame it. The harm must be both serious and rise to the level of abuse. Those words control the standard of proof, and they were given to the jury intact. . . .
>
> This error is serious, and we must admonish the trial bench across the state to vigilantly guard against straying from the constitutional standard in capital sentencing. However, we find beyond a reasonable doubt that it is harmless, for it did not alter the standard of proof,

> and thus could have had no impact on the sentencing decision. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

Johnson v. State, 928 P.2d 309, 318 (Okla. Crim. App. 1996).

Having carefully reviewed the sentencing instructions as a whole, in light of the evidence below, this Court finds that the omission of the word "physical" from the instruction did not destroy the narrowing function of the second paragraph. There is no question, based upon the evidence in this case, that the jury would have interpreted the term "serious abuse" as referring to physical abuse. Furthermore, this Court is convinced that even without the word "physical" in the limiting definition, the instruction, as given, sufficiently narrowed the application of the aggravating circumstance and appropriately channeled the sentencer's discretion. Therefore, this Court finds the decision of the Oklahoma Court of Criminal Appeals is not contrary to clearly established federal law. Accordingly, Petitioner's claim is hereby denied.

2. "Continuing threat" aggravating circumstance

Next, Petitioner argues that "Oklahoma's "continuing threat to society" aggravating circumstance is unconstitutionally vague and overly broad on its face and as construed by the Oklahoma Court of Criminal Appeals." In considering this issue on direct appeal, the Oklahoma Court of Criminal Appeals citing numerous Oklahoma decisions held that this aggravating circumstance is not unconstitutionally vague. *Johnson v. State*, 928 P.2d 309, 316 (Okla. Crim. App. 1996). This finding is consistent

with the Supreme Court's decisions in both *Jurek v. Texas*, 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) and *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2635, 129 L.Ed.2d 750 (1994). See also, *LaFevers v. Gibson*, 182 F.3d 705 (10th Cir. 1999); *Ross v. Ward*, 165 F.3d 793, 800 (10th Cir.), *cert. denied*, ___ U.S. ___, 120 S.Ct. 208, ___ L.Ed.2d ___ (1999); *Castro v. Ward*, 138 F.3d 810, 816 (10th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 422, ___ L.Ed.2d ___ (1998); *Sellers v. Ward*, 135 F.3d 1333, 1340 (10th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 557, 142 L.Ed.2d 463 (1999); and *Nguyen v. Reynolds*, 131 F.3d 1340, 1352-1354 (10th Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S.Ct. 128, ___ L.Ed.2d ___ (1998). Accordingly, this Court finds no merit to this argument.

3. Antisympathy instruction

During the guilt phase of Petitioner's trial, the court instructed the jury that it "should not let sympathy, sentiment, or prejudice enter into your deliberations, but should discharge your duties as jurors impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions." O.R., at p. 786, Instruction No. 27. During the sentencing phase of trial, the court explicitly advised the jury that:

> [A]ll the previous instructions given you in the first part of this trial apply where appropriate and must be considered together with these additional instructions. Together they contain all the law of any kind and the rules you must

> follow in deciding this case. You must consider them all together and not just a part of them.

O.R., at p. 800, Stage II – Instruction No. 11.

Petitioner argues that incorporation of the antisympathy instruction given in the first stage of trial prevented the jury from considering the mitigating evidence which was introduced on his behalf during the second stage of trial. Since Petitioner claims he was entitled to the jury's sympathy and understanding when it considered his mitigating evidence, by not allowing sympathy to sway the jury's sentencing decision, Petitioner argues his Eighth and Fourteenth Amendment rights were violated. In *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), however, the United States Supreme Court rejected a similar challenge to an antisympathy instruction. In rejecting Parks' contention that the antisympathy instruction violated existing precedent by precluding the jury from considering mitigating evidence contrary to *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Ohio*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court said:

> We also reject Parks' contention that the antisympathy instruction runs afoul of *Lockett* and *Eddings* because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them considering that evidence altogether. This argument misapprehends the distinction between allowing a jury to consider mitigating evidence and guiding their consideration. It is no doubt constitutionally permissible, if not constitutionally required . . . for the State to insist that "the individualized assessment of the appropriateness of the

> death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence. [citation omitted] Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary. [citations omitted] At the very least, nothing in *Lockett* and *Eddings* prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a "reasoned moral response," *Brown*, 479 U.S., at 545, 107 S.Ct., at 841 (emphasis in original), rather than an emotional one. The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to it own whims or caprice. [citation omitted]

Saffle v. Parks, 494 U.S. 484, 492-493, 110 S.Ct. 1257, 1262-1263, 108 L.Ed.2d 415 (1990).

Therefore, this Court finds that the Oklahoma Court of Criminal Appeals decision was not contrary to federal law as determined by the United States Supreme Court. Accordingly, pursuant to 28 U.S.C. § 254(d)(1), Petitioner's claim must fail.

4. Jury's consideration of mitigating evidence

Petitioner also argues that the trial court's second stage instructions allowed the jury to ignore mitigating evidence presented on behalf of the Petitioner. Petitioner does not specifically state which instructions are being challenged or how the instructions prevented consideration of relevant mitigation evidence. Rather, Petitioner merely states "[b]ecause the trial court's instructions failed to remove doubt as to the jury's constitutional duty to consider the mitigating circumstances presented to it, Petitioner Johnson's Eighth and Fourteenth Amendment rights were violated and his sentence of death was unconstitutionally obtained." Petition, at p. 72.

The instructions regarding mitigating circumstances provided:

Instruction No. 7

> Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

Instruction No. 8

> Evidence has been offered as to the following mitigating circumstances concerning the Defendant:
>
> 1. Age of the accused at the time of the crime;

2. Educational level;
3. Borderline mental retardation;
4. Organic brain damage;
5. Alcoholism;
6. No prior felony convictions;
7. Evidence of provocation;
8. Evidence of good-natured behavior and passive nature of the Defendant;
9. The Defendant is a follower, not a leader;
10. Prior military service;
11. Maintenance of good family relationships;

Whether these circumstance(s) existed, and whether these circumstance(s) are mitigating, must be decided by you.

O.R., at pp. 796-797, Stage II – Instructions.

The Tenth Circuit Court of Appeals has consistently rejected constitutional challenges to second stage instructions identical to the above-quoted instructions. See *Small v. Gibson*, 191 F.3d 1257, 1271 (10th Cir. 1999) ("There is no reasonable likelihood that the jury applied the instructions in such a way that it was prevented from considering mitigating evidence."); *Cooks v. Ward*, 165 F.3d 1283, 1290 (10th Cir. 1998) ("[T]he instructions, read as a whole, did not preclude jurors from considering and giving effect to any mitigating circumstances in Mr. Cooks' favor. Nor did thy suggest the jury's discretion to avoid the death penalty was limited in any way."), *cert. denied*,

___ U.S. ___, 120 S.Ct. 94, ___ L.Ed.2d ___ (1999); *Boyd v. Ward*, 179 F.3d 904, 924 (10th Cir. 1999) ("The use of the word "may" does not alone compel the conclusion that the jury was empowered to ignore mitigating evidence."); and *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998). Accordingly, this Court finds no merit in Petitioner's argument.

5. Juror unanimity re: mitigating circumstances

Additionally, Petitioner asserts that his Eighth and Fourteenth Amendment rights were violated by the trial court failing to instruct the jury that unanimity was not required in its finding regarding mitigating circumstances. This argument has also been consistently rejected by the Tenth Circuit Court of Appeals.[8] In rejecting this argument, the Tenth Circuit stated:

> The instructions consistently require unanimity only on the jury's finding of aggravating circumstances. Instruction Nos. 6 and 10 require the jury to "unanimously find" aggravating circumstances. In contrast, none of the instructions involving mitigating circumstances impose an express or implied unanimity requirement on the jury's consideration of mitigating evidence. Instruction Nos. 7, 8, and 10 respectively required the jury to "determin[e]," "decide[ ]," and "find" whether mitigating circumstances

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[8] Compare Stage II – Instruction Nos. 6, 7, 8, 9 and 10 with Instruction Nos. 6, 7, 8, 9 and 10 in *Duvall v. Reynolds*, 139 F.3d 768, 790-792 (10th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998).

> existed without any reference to unanimity. Although Instruction No. 9 requires the jury to find unanimously that the aggravating circumstances outweigh any mitigating circumstances before imposing the death penalty, the unanimity requirement there refers only to the jury's balancing of aggravating versus mitigating circumstances, and not to the initial determination of whether mitigating circumstances exist in the first place. Thus, Instruction No. 9 is consistent with the instructions describing the proper evaluation of mitigating evidence.
>
> We hold that there is no reasonable likelihood that the jury applied these instructions in a way that required them to agree unanimously upon the existence of a mitigating circumstance before considering it.

Duvall v. Reynolds, 139 F.3d 768, 792 (10th Cir. 1998). See also, *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); *Johnson v. Gibson*, 169 F.3d 1239 (10th Cir. 1999), *cert. denied*, ___ S.Ct. ___, 1999 WL 688740 (1999); *Cooks v. Ward*, 165 F.3d 1283, 1290-1291 (10th Cir. 1998), *cert. denied*, ___ U.S. ___, 120 S.Ct. 94, ___ L.Ed.2d ___ (1999); *Newsted v. Gibson*, 158 F.3d 1085, 1093 (10th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1509, 143 L.Ed.2d 661 (1999); and *Castro v. Ward*, 138 F.3d 810, 823-824 (10th Cir. 1998), ___ U.S. ___, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998). Accordingly, this claim is denied.

6. Weighing of Aggravating & Mitigating Circumstances

Finally, Petitioner argues that the instructions concerning the weighing of aggravating and mitigating circumstances authorized the jury to impose death if they determined the evidence in aggravation outweighed the mitigating evidence. Thus, Petitioner contends this "preponderance of the evidence" standard is in contravention of "the heightened need for reliability in death penalty cases." Petition at p. 75. While Petitioner suggests that the constitution requires that the jury find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, Petitioner cites no authority for this proposition.[9]

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the United States Supreme Court approved Georgia's statutory death penalty scheme which is similar to the one employed in Oklahoma. In approving Georgia's scheme, the Court did not require specific enunciated standards to guide the jury's consideration of any aggravating and/or mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1982). Accordingly, this Court finds

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[9] Oklahoma's statutes require that a sentence of death be supported by a unanimous finding of the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. 21 O.S. 1991, § 701.11. The statute also requires that any aggravating circumstance found to exist beyond a reasonable doubt must outweigh any mitigating factors which are found to exist. *Id.*

Petitioner has failed to establish any constitutional violation occurred.

VII. JURY QUESTION RE: LIFE WITHOUT PAROLE

In his fourth proposition, Petitioner alleges his Fifth, Eighth and Fourteenth Amendment rights were violated by the trial court's response to the jury's question on the meaning of "life without parole." This claim was raised by Petitioner in his direct appeal and has, therefore, been exhausted.

In considering this issue, the Oklahoma Court of Criminal Appeals made the following findings of fact:

> The jury sent the following note to the trial judge during deliberations:
>
> We need to know! Is life without parole firm – Does it mean he can never be paroled?
>
> (Court's Exhibit #2). The trial court responded, over defense objection:
>
> It is inappropriate for you to consider the question asked.
>
> Defense counsel wanted the trial court to respond:
>
> You have received all that you're going to receive in this matter.
>
> The trial court rejected this response, stating parole was not "appropriate for the jury to be considering."

Johnson v. State, 928 P.2d 309, 319 (Okla. Crim. App. 1996).

Further, upon consideration of Petitioner's arguments, the Oklahoma court found:

> Over defense objection the trial court told the jury it was not appropriate for it to consider whether the defendant could "never be paroled". This is a misstatement of law, for as *Mayes* makes clear, the jury must consider the distinctions between life, life without parole and death as it reaches the sentencing decision. [citation omitted] The trial court's response to the jury is error. We must, therefore, determine whether this error requires reversal.
>
> Misinstruction of the jury may be found harmless. See *Carella v. California,* 491 U.S. 263, 266, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (instruction with erroneous conclusive presumption); *Pope v. Illinois,* 481 U.S. 497, 501, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987) (misinstruction on elements of offense). The error may be deemed harmless only if we find beyond a reasonable doubt that it did not affect the jury's decision to impose the death penalty. See *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).
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> *McCracken, McGregor,* and *Mayes* make clear that in this jurisdiction the jury is not to be told of the inner workings of the parole system, even when it must compare two life sentences: one with the possibility of parole, and one without the possibility of parole. In none of these cases did the trial judge give a responsive answer to the jury's question. Likewise, the judge's answer in this case was non-responsive. The ultimate effect of all these responses was to force the jurors back to the plain language of the instructions. From the standpoint of what the jurors

> must do following trial judge's response, we find no meaningful behavioral difference flowing from the approved responses in *McCracken*, *McGregor*, and *Mayes*, which could be summarized as, "I am not going to answer that question", and the response in the case before us which could be summarized as, "Don't ask." We therefore find the trial judge's response in this case to be harmless beyond a reasonable doubt.

Id., at p. 320.[10]

Petitioner argues that *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), required the judge to inform the jury he would not be eligible for parole if sentenced to "life without parole." Unlike the present case, however, the jury in *Simmons* was only given two sentencing options, either 1) life imprisonment or 2) a sentence of death. Further, defense counsel, concerned the jury might not realize that "life imprisonment" did not carry the possibility of parole, specifically requested that the court define the term "life imprisonment" in accordance with South Carolina statutes. *Id.*, U.S. at 158, S.Ct. at 2191. The court, however, refused to define "life imprisonment." *Id.*, U.S. at 160, S.Ct. at 2192. After deliberating petitioner's sentence for approximately 90 minutes, the jury sent a note to the judge asking: "Does the imposition of a life sentence carry with it the

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[10] *McCracken v. State*, 887 P.2d 323 (Okla. Crim. App. 1994), *cert. denied*, 516 U.S. 859, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995); *McGregor v. State*, 885 P.2d 1366 (Okla. Crim. App. 1994), *cert. denied*, 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995); and *Mayes v. State*, 887 P.2d 1288 (Okla. Crim. App. 1994), *cert. denied*, 513 U.S. 1194, 115 S.Ct. 1260, 131 L.Ed.2d 140 (1995).

possibility of parole?" The court responded by telling the jury they were not to consider parole or parole eligibility in reaching their decision and that "the terms life imprisonment and death sentence" should be "understood in their plan [sic] and ordinary meaning." *Id.* The Court held where a "defendant's future dangerous is at issue, *and* state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* (Emphasis added)

In reaching its decision in *Simmons*, the Court relied upon the fact that twenty-six states, including Oklahoma, actually provided for life imprisonment without parole as an alternative to capital punishment. *Id.*, U.S. at 168, n. 7, S.Ct. at 219. Further, the concurring opinion of Justice O'Connor, makes it clear the rule in *Simmons* applies only in those cases where "the only available sentence to death is life imprisonment without possibility of parole." *Id.*, U.S. at 178, S.Ct. at 2201.

Courts confronted with the issue of whether to extend *Simmons* to require more information to be given a sentencing jury have declined to do so. See *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir. 1995), *cert. denied*, 516 U.S. 1100, *Keel v. French*, 162 F.3d 263 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1998); *Burgess v. State*, 450 S.E.2d 680 (Ga. 1994), *cert. denied*, 515 U.S. 1133, 115 S.Ct. 2559, 132 L.Ed.2d 813 (1995).

Here, Petitioner's jury was given three sentencing options: 1) life imprisonment; 2) life imprisonment without parole; and 3) a death sentence. Further, unlike the defendant in *Simmons*, nothing in the Oklahoma statutes

mandated that Petitioner could never be released on parole if the jury had simply imposed a life sentence. Rather, as recognized by the Oklahoma Court of Criminal Appeals in *Mayes v. State*, 921 P.2d 367, 373 (Okla. Crim. App. 1996), "there always exists the possibility in Oklahoma a governor could commute a sentence to one where a possibility of parole exists."

Additionally, in this case, unlike *Simmons*, the court did not refuse to admit evidence that life without parole meant Petitioner would never be paroled to rebut the State's continuing threat aggravator. Thus, Petitioner was not "prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death." *Simmons, supra*, U.S. at 165, S.Ct. at 2194.

Furthermore, the Court in *Simmons* stated: "In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of the information regarding parole." *Id.*, U.S. at 168, S.Ct. at 2196. Finally, based upon the jury's finding of the "especially heinous, atrocious and cruel" aggravating factor, this is not a case where future dangerousness was the jury's only reason for ensuring that Petitioner would not be released from prison.

While the Oklahoma court found the trial court's response was error under state law, this Court does not believe this error was of a constitutional magnitude. However, even if this Court were to assume the error was a constitutional error, this Court finds the decision of the

Oklahoma Court of Criminal Appeals is not contrary to, nor an unreasonable application of, clearly established federal law.[11] Thus, Petitioner is not entitled to relief.

VIII. PROSECUTORIAL MISCONDUCT

In his fifth proposition, Petitioner alleges his Fifth, Eighth and Fourteenth Amendment rights were violated by the prosecutor commenting on Petitioner's mental retardation and organic brain damage during the second stage closing arguments. The essence of Petitioner's claim is that the comments of the prosecutor turned Petitioner's mitigating evidence into aggravating evidence in violation of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

This issue was first raised on direct appeal. The Oklahoma Court of Criminal Appeals found this error was not objected to at trial. Therefore, all but fundamental errors were waived. *Johnson v. State*, 928 P.2d 309, 320 (Okla. Crim. App. (1996). The Court proceeds, however, to consider the issue on its merits stating:

> In the second-stage closing argument the prosecutor told the jury that the defendant's organic brain damage and alcoholism, two mitigating factors listed by the court in its instructions, were "really things that count against the defendant in this case." [Petitioner] relies on

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[11] See *O'Dell v. Netherland*, 95 F.3d 1214, 1239, FN. 14 (4th Cir. 1996), in which the Fourth Circuit, without addressing the issue, assumes that failure to give a *Simmons* instruction could be considered harmless error under *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993).

> *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) to argue this violated his right (sic) under [the] Eighth and Fourteenth Amendment (sic) to have his mental retardation considered as mitigating evidence. The State counters with *Nguyen v. State*, 769 P.2d 167 (Okl.Cr.), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989); and *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983) to argue the State may use any evidence as well as reasonable inferences therefrom in its closing argument.
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> We find *Penry* is not controlling for in that case the jury was prohibited from considering the defendant's mental retardation which was offered as mitigation. 492 U.S. at 320, 109 S.Ct. at 2947. The [Petitioner's] jury was not prohibited from considering his reduced mental capacity, and the prosecutor was well within the bounds of fair argument to comment on the weight of the mitigation evidence from the State's perspective.

Johnson v. State, 928 P.2d 309, 321 (Okla. Crim. App. 1996).

In a federal habeas proceeding, review of a state prosecutor's allegedly prejudicial remarks is limited to remarks which cause a defendant's constitutional rights to be violated. *Coleman v. Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986). Only if a prosecutor's comments render the trial so fundamentally unfair as to amount to a denial of due process, would habeas relief be warranted. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "In evaluating whether prosecutorial misconduct was "so flagrant as to deny a defendant a fair trial, [this

court] must take notice of all the surrounding circumstances, including the strength of the state's case." *Coleman v. Brown, supra.*

In *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the United States Supreme Court addressed the limited issue of whether Penry had been sentenced to death in violation of the Eighth Amendment "because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence." *Id.,* U.S. at 307, S.Ct. 2491. In *Penry,* even though substantial mitigating evidence had been presented, if the jury found the existence of the listed aggravating factors, they were required to impose the death penalty regardless of the mitigating evidence which had been presented.

In Petitioner's case, the jury was required to determine whether one or more of the aggravating circumstances existed beyond a reasonable doubt, before they could even consider imposing the death penalty. O.R., at p. 795, Instruction No. 6. In order to convince his jury that the death penalty should not be imposed, Petitioner was given the opportunity to present "any relevant evidence . . . bearing on his character, prior record or the circumstances of the offense." *Chaney v. State,* 612 P.2d 269, 279-280 (Okla. Crim. App. 1980) (construing OKLA. STAT. tit. 21, § 701.10). In this case, the trial court instructed the jury that evidence had been offered regarding eleven different mitigating circumstances. O.R., at p. 797, Instruction No. 8. After unanimously finding that one or more of the aggravating circumstances existed beyond a reasonable doubt, in order to recommend the death penalty, the jury was required to unanimously find

that such aggravating circumstance(s) outweighed any mitigating circumstances which had been found. *Id.*, at p. 798. Instruction No. 9. See also, OKLA. STAT. tit. 21 § 701.11. Thus, the jury was free to consider the weight to be given to each of the mitigating circumstances which Petitioner had introduced into evidence. Clearly, under these facts, Petitioner was provided the individualized sentencing determination which is required by the Eighth Amendment. The challenged statements by the prosecutor did not, in any way, detract from this constitutional right.

After reviewing the challenged statements of the prosecutor herein, in the totality of the circumstances surrounding Petitioner's trial, this Court finds that none of the comments by the prosecutor undermined any specific constitutional rights of the Petitioner nor denied Petitioner a fundamentally fair trial. This Court has simply found no authority which suggests that a prosecutor is prohibited from arguing differing inferences from the same evidence. Rather, evidence one person might consider mitigating evidence could easily be considered a "two-edged sword," if it diminished one's blameworthiness for the crime while, at the same time, it indicates a probability that the individual would be dangerous in the future. See *Penry v. Lynaugh*, 492 U.S. 302, 324, 109 S.Ct. 2934, 2949, 106 L.Ed.2d 256 (1989). Accordingly, this Court finds that the decision of the Oklahoma Court of Criminal Appeals is not contrary to, nor does it involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Therefore, Petitioner's claim for relief is denied.

IX. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's sixth proposition alleges his Sixth and Fourteenth Amendment rights were violated due to ineffective assistance of counsel. Specifically, Petitioner asserts counsel should have done more investigation and presented more mitigating evidence during the penalty phase of trial.[12] Petitioner first raised his claim of ineffective assistance of counsel during post-conviction proceedings. The Oklahoma Court of Criminal Appeals held this issue was waived for failure to raise it on direct appeal. *Johnson v. State,* PC 97-339 (Okla. Crim. App. March 19, 1988). Therefore, the claim has been exhausted for the purpose of federal habeas review.

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the legal standards which apply to claims of ineffective assistance of counsel in a criminal proceeding. First, the Court indicated that the defendant must establish that the representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must establish that the deficient performance prejudiced the defense. *Id.,* 466 U.S. at 687, 104 S.Ct. at 2064. Failure to establish either prong of the *Strickland*

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[12] Petitioner also argues, in other propositions, that trial counsel was ineffective for failing to object to several jury instructions. These allegations are dealt with in paragraph VI herein. Having found no merit to Petitioner's challenges to the jury instructions, this Court finds no merit to Petitioner's allegations that counsel was ineffective for failing to object to said instructions.

standard will result in a denial of Petitioner's Sixth Amendment claims. *Id.*, 466 U.S. at 696, 104 S.Ct. at 2069-2070. While ensuring that criminal defendants receive a fair trial, considerable judicial restraint must be exercised. As the Supreme Court cautioned in *Strickland*,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id., 466 U.S. at 689, 104 S.Ct. at 2065. In order to establish prejudice in the guilt stage, the defendant has to show "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. While at the penalty stage of a capital case, the defendant must show "there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*

The United States Supreme Court has indicated that every effort must be made by a reviewing court to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, the Court indicated that the conduct of counsel is "strongly presumed" to have been within the wide

range of reasonable professional assistance. *Id.* Accordingly, this Court reviews this issue in light of the particular facts and circumstances of this case and in view of counsel's knowledge at the time of his conduct.

While an attorney has an affirmative duty to conduct an investigation of potential mitigation evidence, that duty is not boundless. *Breechen v. Reynolds,* 41 F.3d 1343, 1365 (10th Cir. 1994). Further, since counsel does not have an absolute duty to present any mitigating character evidence, the fact he did not call these witnesses does not automatically render his conduct unreasonable. *Id.* at 1368. Particular decisions not to investigate must be considered in light of all the circumstances with deference weighing heavily in favor of counsel's judgment. *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066.

Although Petitioner asserts his counsel should have done more investigation and presented more mitigating evidence during the penalty phase of trial, this is not a case where no mitigating evidence was presented. Rather, a review of the record establishes that counsel presented testimony of a psychologist, Dr. Phillip Murphy, in both stages of trial. J.T. Tr., Vol. IV, at pp. 592-615 and 690-695. Dr. Murphy's first stage testimony was incorporated into the second stage of trial. *Id.,* at p. 696.

Dr. Murphy's testimony indicated that, on September 11, 1991, he conducted a "standard psychological evaluation" of Petitioner. Thereafter, on September 30, 1991, a"neuropsychological battery" was performed on Petitioner. *Id.,* at p. 594. Using the "Wechsler Adult Intelligence Scale", Dr. Murphy testified that Petitioner's intellectual function was in the "borderline mentally

retarded range." *Id.*, at p. 595. Dr. Murphy also testified Petitioner went to the 9th grade; however, Petitioner's reading level was about 3rd grade level. *Id.*, at pp. 595-596. Dr. Murphy further testified that Petitioner had served in the Army from 1972 to 1974, while stationed in Germany. *Id.*

Dr. Murphy's evaluations indicated no evidence that Petitioner would be a good leader. Rather, Dr. Murphy felt Petitioner would probably take the lead of someone else. *Id.*, at p. 597-598. Dr. Murphy testified he found evidence to suggest Petitioner had organic brain damage. *Id.* Dr. Murphy also testified that Petitioner had severe alcohol problems and a seizure disorder. *Id.*, at p. 601. Dr. Murphy explained because of Petitioner's brain damage, Petitioner would be at a much higher risk of exhibiting poor judgment when using alcohol. *Id.*, at p. 603-604.

Additionally, Dr. Murphy testified that in his opinion, if Petitioner was under the influence of alcohol, it would be "highly unlikely" that Petitioner would be able to form the intent to commit murder. *Id.*, at p. 606. Dr. Murphy also testified that, based upon his testing, Petitioner was not a violent person and that, under normal circumstances, Petitioner was not likely to commit any violent or anti-social acts. *Id.*, at 604. Finally, Dr. Murphy testified, in his opinion, Petitioner would not pose a threat to society if he were sentenced to life or life without parole. *Id.*, at p. 691.

During the second stage of trial, counsel entered into a stipulation that Petitioner had no prior felony convictions. *Id.*, at p. 705. Defense counsel also called the Sheriff and Under sheriff of Love County, who both testified

Petitioner had not caused any trouble during the eighteen months lie had been incarcerated within the county jail and that Petitioner was compliant with directives. *Id.*, at pp. 706-714.

Defense counsel attempted to present the testimony of Petitioner's brothers, Kenneth Johnson and Donald Payne, but due to a violation of the rule of sequestration they were not permitted to testify. *Id.*, at pp. 715-716. Counsel made an offer of proof advising the trial court that these witnesses were from out of town, had not been present from the start of the trial and he did not see them come into the courtroom. *Id.*, at p. 718. This offer of proof is further buttressed by an affidavit of Dora S. Roberts, an attorney employed by the Oklahoma Indigent Defense System, in which trial counsel advised Ms. Roberts that he had told some of the family members to remain outside the courtroom, but that these particular witnesses had come in from out of town and he had not seen them enter the courtroom. Post-Conviction Application, Appendix II, Vol. I. Counsel's offer of proof indicated these witnesses would have reiterated much of the testimony of Dr. Murphy regarding facts such as Petitioner was "slow" intellectually and had learning problems or was mentally deficient; that Petitioner suffered from alcohol problems; and that Petitioner had volunteered during the Vietnam War and was honorably discharged. *Id.*, at pp. 718-719.

The record herein establishes counsel was able to get evidence before the jury concerning the following mitigating circumstances:

1. Age of the accused at the time of the crime;
2. Educational level;
3. Borderline mental retardation;
4. Organic brain damage;
5. Alcoholism;
6. No prior felony convictions;
7. Evidence of provocation;
8. Evidence of good-natured behavior and passive nature of the Defendant;
9. The Defendant is a follower, not a leader;
10. Prior military service;
11. Maintenance of good family relationships.

O.R., at p. 797, Stage II – Instruction No. 8.

Even though Petitioner now argues counsel failed to conduct a proper mitigation investigation and submits affidavits from family members who claim counsel did not talk to them in preparation for the second stage, Petitioner fails to establish any evidence, other than what was actually presented to the jury, which would have convinced the jury to sentence the Petitioner to something less than death. In *Foster v. Ward*, 182 F.3d 1177, 1189 (10th Cir. 1999), the Tenth Circuit, without deciding whether Mr. Foster's counsel was ineffective for failing to investigate, prepare or present potential mitigation evidence, concluded "evidence of a troubled childhood involving physical, emotional, sexual and/or substance abuse does not outweigh evidence supporting the conviction and evidence supporting multiple aggravating circumstances; nor does evidence of low I.Q. and/or organic

brain function." In assessing prejudice in this case, this Court has considered the available mitigating evidence presented, the strength of the State's case and the aggravating factors found by the jury. See, *Boyd v. Ward*, 179 F.3d 904, 918 (10th Cir. 1999). After a review of the entire record herein, this Court finds the affidavits of Petitioner's brothers and/or sisters are merely cumulative of the testimony of Petitioner's expert witness.[13] Furthermore, this Court concludes Petitioner had failed to establish that the jury would not have sentenced him to death if the testimony which he now submits would have been admitted at trial. Further, based upon the facts as they appear from the trial court records, this Court does not feel that counsel's conduct fell outside the wide range of "reasonable professional assistance" which would render Petitioner's trial fundamentally unfair. Therefore, since Petitioner has failed to establish either prong of the *Strickland* standard, he is not entitled to relief on this claim.

Finally, Petitioner asserts he is entitled to an evidentiary hearing on this issue. having found that the existing factual records do not support Petitioner's claim of ineffective assistance of counsel, Petitioner is not entitled to an evidentiary hearing. *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998).

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[13] It should also be noted that one of the affidavits submitted indicates counsel prepared this case with the idea that Petitioner would take the stand. Only after the close of the State's evidence, did Petitioner inform his attorney that he would not testify thereby causing counsel to alter previous courtroom strategies. See Post-Conviction Application, Appendix II, Vol. I, Affidavit of Sam Buck.

X. CONFLICT OF INTEREST

In his final allegation of error, Petitioner asserts his Sixth, Eighth and Fourteenth Amendment rights were violated due to a conflict of interest sanctioned by the State of Oklahoma. Specifically, Petitioner alleges the Oklahoma Indigent Defense System (hereinafter OIDS), a state agency, oversaw the defense of both Petitioner and his co-defendant. Petitioner asserts the ongoing conflict between appointed counsel Gary Hart and OIDS occurred in two main areas. First, Petitioner asserts a conflict arose over his right to use Dr. Murphy. Second, Petitioner asserts the investigator hired by his trial counsel, Tom Davidson, was hired in the midst of trial as an OIDS staff attorney and was thus precluded from assisting Petitioner Johnson. Finally, Petitioner asserts his post-conviction documentation demonstrates a "serious potential existed throughout trial that his defense was being compromised by a conflict of interest." Petition at pp. 92-93. The Respondent urges this Court to find that Petitioner is procedurally barred from raising this issue herein.

A. Procedural Bar

Generally, if a petitioner has failed to present a claim to the state courts in the manner prescribed by the procedural rules of the state, the state court may deem the claim defaulted. *Wainright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Where a state prisoner defaults his federal claims in state court based upon an independent and adequate state procedural rule, federal review of his habeas claims will be barred. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553-54, 115

L.Ed.2d 640 (1991). If the state court's finding is separate and distinct from federal law, it will be considered "independent." See *Ake v. Oklahoma*, 470 U.S. 8, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *Duvall v. Reynolds*, 139 F.3d 768 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 345 (1998). If the finding is applied "evenhandedly to all similar claims", it will be considered "adequate." *Maes v. Thomas*, 46 F.3d 979 (10th Cir. 1995), *cert. denied* 514 U.S. 1115, 115 S.Ct. 1972, 131 L.Ed.2d 86 (1995) (citing *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421 2426, 72 L.Ed.2d 824 (1982)).

Where the state-law default prevented the state court from reaching the merits of the federal claim, the claim ordinarily can not be reviewed in the federal courts. *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). "Review is precluded 'unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.' " *Breechen v. Reynolds*, 41 F.3d 1343 (10th Cir. 1994), *cert. denied*, 515 U.S. 1135, 115 S.Ct. 2564, 132 L.Ed.2d 817 (1995) and cases cited therein.

As noted in *Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 378 (1998), the procedural default rule is not a jurisdictional rule; rather, it is based upon the principles of comity and federalism. Further, the Tenth Circuit has held Oklahoma's post-conviction statute,[14] which bars review of claims that could have been raised on direct appeal including issues

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[14] 22 O.S. Supp. 1995, § 1089.

involving fundamental, constitutional rights, is an "adequate, as well as independent, state ground" which can effectively bar federal habeas review. *Steele v. Young*, 11 F.3d 1518, 1521 (1993).

This claim was first raised by Petitioner in his application for post-conviction relief. In denying post-conviction relief, the Oklahoma Court of Criminal Appeals stated:

> Post-conviction review is limited to those issues which could not have been raised on direct appeal *and* which support a conclusion either that the outcome of the trial would have been different, or that the defendant is factually innocent. 22 O.S.Supp. 1995, § 1089(C). An issue could not have been raised on direct appeal if 1) the facts were not and with reasonable diligence could not have been available to direct appeal counsel; 2) the legal ground was not recognized at the time the direct appeal was filed, 3) the issue is based on a new rule of constitutional law which has been given retroactive effect; 4) the claim of ineffective assistance of trial counsel requires fact-finding outside the direct appeal record; or 5) the appellant was denied reasonably effective appellate counsel. 22 O.S.Supp. 1995, § 1089(D)(4)(b) & (9).
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> * * *
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> In the final proposition of error the petitioner claims he was subjected to a state-sanctioned conflict of interest caused when the investigator who was working on his case was hired by the Oklahoma Indigent Defense System which represented his co-defendant. This issue was not raised on appeal, and thus is waived

> unless it could not have been raised. Since the facts which form the basis of the argument were ascertainable through the exercise of reasonable diligence by appellate counsel, we find waiver of the issue is not excused, and consideration of the merits is procedurally barred. *See* 22 O.S.Supp. 1995, § 1089(D)(9).

Johnson v. State, Case No. PC 97-339, Opinion Denying Original Application for Post-Conviction Relief, Request for Evidentiary Hearing and Motion for Discovery, filed March 19, 1998.

Petitioner does not attempt to show cause or prejudice to excuse his waiver. After careful consideration of the records below, there is no question that this issue could easily have been raised on appeal. Therefore, this Court finds Petitioner is procedurally barred from raising this issue herein.

B. Merits of Claim

Assuming for purpose of argument that Petitioner's claim is not procedurally barred, this Court finds no merit to the claim. Specifically, in *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980), the Court held that ". . . . the possibility of conflict is insufficient to impugn a criminal conviction." To establish a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. *Id.*

In this case, while Petitioner indicates there was some disagreements between trial counsel and OIDS, there is nothing within the record to establish an actual

conflict of interest adversely affected his lawyer's performance. For instance, one of the disagreements/misunderstandings which is apparent from the record is the fact that Petitioner's counsel, Gary Henry, was initially appointed to represent Petitioner's co-defendant, Rick Masquat, and OIDS was appointed to represent Petitioner. Prior to Mr. Henry even meeting with Petitioner's co-defendant, an OIDS attorney met with Mr. Masquat. After OIDS learned they had interviewed the wrong defendant, they asked the court to switch the appointments. The court complied with the request. See Post-Conviction Application, Appendix II, Vol. I, Affidavit of Gary Henry. Petitioner does not cite any facts which would even suggest that an actual conflict of interest arose due to this error on the part of OIDS.

Next, Petitioner states that OIDS approved funds for the retention of Dr. Phillip Murphy for purposes of conducting a psychological analysis of Petitioner. After Dr. Murphy had completed testing and evaluating Petitioner, OIDS advised counsel he would not be able to use Dr. Murphy because OIDS wanted to use him for the co-defendant. *Id.* Regardless of any disagreement that may have arose over the use of Dr. Murphy, there is no question that Petitioner actually called Dr. Murphy as a witness at trial. Therefore, this Court finds no effect whatsoever upon Petitioner's trial as a result of this misunderstanding.

Finally, Petitioner complains that trial counsel was not allowed to call Tom Davidson, an investigator retained with OIDS permission, since OIDS had hired Mr. Davidson as a staff investigator shortly before Petitioner's trial. According to trial counsel, he could not call

Mr. Davidson as a witness because "Mr. Davidson told me on the day of trial that he did not know why he was there because he could not testify for Mr. Johnson because of the conflict of him now working for the co-defendant." *Id.* Trial counsel's affidavit is, however, contradicted by an affidavit from Ms. Nicolle Y. Ware, an attorney-investigator for OIDS, which indicates Mr. Davidson told Ms. Ware "he did not know why Henry did not call him." See Post-Conviction Application, Appendix II, Vol. I, Affidavit of Nicolle Y. Ware dated May 13, 1997. Further, Mr. Davidson told Ms. Ware "he was not working for OIDS when he was working with Gary Henry and that he believed that he was hired by OLDS after his work on the Mark Johnson case. He also stated that he did not work on the co-defendant's case." *Id.* Based upon this information, this Court does not find an actual conflict of interest existed at the time of Petitioner's trial.

Finally, the record clearly establishes trial counsel exercised his independent professional judgment on behalf of the Petitioner and trial counsel was ultimately able to adequately represent the interests of Petitioner without interference by OIDS into his actual trial strategies. Therefore, this Court finds Petitioner has failed to establish an actual conflict of interest adversely affected his lawyer's performance. Accordingly, Petitioner is not entitled to relief herein.

XI. CONCLUSION

Petitioner has failed to establish that he is in custody in violation of the Constitution or laws of the United

States as required by 28 U.S.C. § 2254(a). Accordingly, the Petition for Writ of Habeas Corpus is denied.

/s/ Frank H. Seay
FRANK H. SEAY
UNITED STATES DISTRICT JUDGE

Oklahoma Court of Criminal Appeals

Johnson v. State

1996 OK CR 36
928 P.2d 309
Case Number: F-93-281
Decided: 08/05/1996
Modified: 08/22/1996
Mark David JOHNSON, Appellant v.
STATE of Oklahoma Appellee.

Cite as: 1996 OK CR 36, 928 P.2d 309

An Appeal from the District Court of Love County Before the Honorable John H. Scaggs, District Judge.

Mark David Johnson, Appellant, was tried by jury for the crime of MURDER IN THE FIRST DEGREE in Case No. CRF-91-46 in the District Court of Love County before the Honorable John H. Scaggs, District Judge. Appellant was sentenced to death. Judgment and Sentence is AFFIRMED.

Gary L. Henry, Ardmore, Samson R. Buck, Ardmore, Defense Counsel, at trial.

Fred Collins, District Attorney, Ardmore, L. Jack Barton, First Assistant District Atty., Marietta, Prosecutors, at trial.

Carol A. Walker and Robert W. Jackson, Asst. Appellate Indigent Defenders, Norman, for Appellant on appeal.

Susan Brimer Loving, Attorney General of Oklahoma, A. Diane Blalock, Assistant Attorney General, Oklahoma City, for the State on appeal.

OPINION

LANE, Judge:

Mark David Johnson, Appellant, was convicted by jury for the crime of malice aforethought First Degree Murder in violation of 21 O.S.1991, § 701.7(A) in Love County District Court Case No. CRF-91-46. The jury recommended the death sentence after finding two aggravating circumstances: (1) the murder was especially heinous, atrocious or crūel, and (2) there was a probability that the defendant would pose a continuing threat to society. *See* 21 O.S.1991, § 701.12(4), (7). The trial court sentenced accordingly. We affirm judgment and sentence.

FACTS

Thirty-three year old Billy Webb lived with his mother in the Presidential Gardens apartment complex in Norman, Oklahoma. He had mental problems, and acted like a twelve or thirteen year old child. He played with the residents' children, took medication for his mental problems, and often behaved oddly. He stared at people and showed up on their patios and in their garages uninvited. People who knew him believed he was harmless. The apartment manager, Carol Lowe, knew him well, and gave him odd jobs around the complex.

On July 23, 1991 Mark David Johnson, who lived at the complex and worked there as the painter, told Lowe that if he thought Webb was going to hurt her children he would "take a baseball bat to him, pour gas on him and throw a match on him." Johnson had made a similar statement to Lowe's husband. The next day Johnson told

several co-workers that if they couldn't do anything about Webb, he could.

The next evening Webb held the flashlight while one of the tenants and her boyfriend put mud flaps on her truck. When the job was done, Webb told them he was going to go out and party. He left in an orange and white Chevrolet pickup with Mark David Johnson and Rickey Masquat.[1] The next morning around 6:30 a.m. a motorist saw Webb standing naked in the middle of Putnam Road near Marietta in Love County. The motorist thought Webb was covered with mud. He called the Love County Sheriff, and Deputy Kenny Walker came to the site and heard Webb calling to him from tall grass by the side of the road. Webb was bleeding from a head wound, and his skin had been burned off. He told Walker that "Mark" hit him over the head with a baseball bat, and "Rickey" poured gasoline on him from a plastic jug and set him on fire. Webb also told him the men were headed to Dallas in a 1973 or 1974 orange and white Chevrolet pickup truck. Unknown to Deputy Walker, Johnson and Masquat had been contacted by the Highway Patrol earlier that morning as they walked away from their orange and white Chevrolet pickup that was stuck in the median of I-35 with a flat tire. The Trooper offered to call a wrecker, but when the men stated they wanted to call home, they were taken to the Chickasaw Trading Post. As a result of radio contact between the Sheriff's office and the Highway

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[1] Masquat was tried separately, convicted and sentenced to life imprisonment without possibility of parole. Judgment and sentence was affirmed by unpublished opinion. *Masquat v. State*, (F-93-1369; July 26, 1996).

Patrol, Johnson and Masquat were arrested at the trading post.

The Trooper noticed blood on Johnson's sleeve and Johnson explained the blood came from the bloody nose he got when the truck hit the ditch. A bloody baseball bat, and a plastic jug with traces of gasoline was found in the bed of the truck. Forensic examination established the blood on the bat and shirt was consistent with Webb's blood. Johnson's shorts had gasoline on them. A plastic cap which fit the jug perfectly was found at the site where Webb was burned.

Webb lived for approximately seventeen hours after being burned. He was treated at the scene, at the Love County Health Center, at Ardmore Memorial Hospital, and at the Hillcrest Burn Center in Tulsa. He remained lucid until his death, his pain minimized by the fact the nerves in his skin had been burned away. During this time he was able to communicate, for he rejected sedatives in the hope he would be able to talk with his mother before he died.

Webb told the paramedic who treated him at the scene, "Rick and Mark, my friends" had done this to him. When the paramedic asked why they did it, Webb replied, "They say I messed with some kids and I didn't do that." Webb told a Tulsa Police Detective the same thing he told Deputy Walker, Mark hit him with the bat and Rick soaked him with gasoline and set him on fire.

I. JURY SELECTION

Appellant argues in his first proposition of error the trial court erred by failing to remove three veniremen for cause. Venireman Whiteley was passed for cause by the defendant, veniremen Miller-Reed and Robertson were challenged when each expressed the opinion that if the defendant was innocent he should take the stand. The trial judge denied these challenges, and the defense then struck these veniremen by peremptory challenge.

The State relies on *Plantz v. State*, 876 P.2d 268, 277 (Okl.Cr. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1130, 130 L.Ed.2d 1091 (1995) to argue the defense waived any appellate argument regarding Whiteley when it passed her for cause at trial. We find *Plantz* controlling, and do not reach the merits of this argument which has not been preserved for our review.

After Miller-Reed and Robertson expressed their opinion that the defendant should testify if he was innocent, the trial court explained the defendant's Fifth Amendment right to silence, and admonished these veniremen they would be instructed not to consider the defendant's silence at all. When the trial judge asked if they could follow this law, they replied they could.

This Court will reverse the decision of a trial court regarding jury selection only if that decision rises to an abuse of discretion. *Id.* at 277. A trial judge commits an abuse of discretion when the judge's decision is not supported by the law or facts of the case. *Walker v. State*, 780 P.2d 1181, 1183 (Okl.Cr. 1989). Excusal for cause is justified when, among other things, a juror cannot try the issue impartially, and without prejudice to the substantial

rights of the party challenging the juror. *See* 22 O.S.1991, § 659. When the two veniremen agreed to follow the law as set forth by the judge, they no longer prejudiced the substantial Fifth Amendment right of the defendant. Therefore, the trial court's decision to deny the challenge for cause is within the proper exercise of his discretion.

During voir dire the trial court asked prospective jurors:

> If you find that the law and the evidence in this case warrants the recommendation of the death penalty could you vote to recommend that penalty?

The Appellant argues in his sixth proposition of error that by using the word "recommend", the trial court lessened the responsibility these jurors would feel, as they could conclude the appropriateness of the death sentence rested elsewhere. Such a result, he asserts, would violate the Eighth Amendment of the federal constitution. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985).

This argument was rejected in *Romano v. State*, 847 P.2d 368 (Okl.Cr. 1993), *affirmed*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). In *Romano* the trial court's use of the word, "recommend" in *voir dire* was not error where the proper and complete sentencing instructions were given in the second stage of trial. *Id.* at 390. Appellant tries to distinguish his case by arguing the fact the jury sent a note to the judge during deliberations asking whether life without parole meant the defendant would never be paroled. We find nothing in the post-sequestration communication that takes this case outside the reasoning of

Caldwell or *Romano*. We address the correctness of the trial court's response to the jury below.

II. FIRST STAGE OF TRIAL: GUILT-INNOCENCE

A. EVIDENTIARY ISSUES

Appellant challenges the sufficiency of the evidence in his third and fifth propositions of error. He asserts the State failed to prove beyond a reasonable doubt that he (1) intended the victim be killed; and (2) was a principal, even as an aider and abetter. Appellant bases this argument on the uncontroverted evidence that Masquat soaked the victim with gasoline and set him on fire. The State counters with *Van Woundenberg v. State*, 720 P.2d 328 (Okl. Cr.), *cert. denied* 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986). In that case the accused helped plan the murder, acted as a lookout during the murder, and helped dispose of the body, but did not personally kill the victim. *Id.* at 333. This evidence was sufficient to prove malice aforethought.

The State introduced the following uncontroverted evidence. Three days before the murder Johnson said he would hit Webb with a baseball bat, soak him with gasoline and set him on fire if Webb hurt a child. As Johnson and Masquat attacked Webb, one of them told Webb he was being burned because he had harmed a child. Blood consistent with Webb's blood was found on Johnson's shirt; gasoline was found on his shorts. Johnson and Masquat were together when they picked Webb up in Norman, together during the attack, and together as they walked away from their mired truck.

We will apply this evidence first to the question of intent to kill. Malice aforethought, an element of murder in the first degree as charged in this case, is the deliberate intention to take away the life of a human being. 21 O.S.1991, § 701.7. This intent is manifest by external circumstances capable of proof. *Id.*

Both direct and circumstantial evidence of intent was introduced at trial. The direct evidence came from the Appellant's own mouth. Two days before the murder he told his apartment manager he would hit Webb with a baseball bat and burn him with gasoline if he hurt a child. The next day the Appellant assured the tenants he could take care of Webb. During the attack Johnson or Masquat told Webb he was being burned because he had "messed with" a child.

Circumstantial evidence of intent to kill comes from the massive extent of the burning itself. Together this evidence, viewed in the light most favorable to the prosecution, must allow any rational trier of fact to find intent to kill. *See Drew v. State,* 771 P.2d 224, 227 (Okl.Cr. 1989). It does.

We now examine the evidence to determine if it is sufficient to prove Johnson was a principal, even as an aider and abetter. Citing *Mann v. State,* 749 P.2d 1151 (Okl. Cr.), *cert. denied,* 488 U.S. 877, 109 S.Ct. 193, 102 L.Ed.2d 163 (1988), the Appellant argues persuasively that in a malice murder case the State must prove the aider and abetter personally intended the death of the victim and aided and abetted with full knowledge of the intent of the perpetrator. We agree this is the proper standard of proof.

We do not agree the evidence was insufficient to prove Johnson aided and abetted the commission of this crime. In the space of three days Johnson foretold how and why Webb would be killed, Johnson told tenants he could take care of the problems Webb caused, and while Webb was being attacked Johnson or Masquat told him the precise reason, articulated earlier by Johnson, for the attack. There is no doubt whatsoever that this Appellant personally intended that Webb die.

B. JURY INSTRUCTION

Appellant raises two challenges to the first-stage instruction of the jury: (1) the instruction regarding aiding and abetting allowed the jury to convict without finding an intent to kill; and (2) the confusion created by the causation instruction amounts to plain error. We address these issues, raised in propositions of error two and four, in turn.

The Oklahoma Uniform Jury Instructions regarding aiding and abetting were given in this trial. *See* OUJI-CR 204, 205, 206, 207 and 208. Defense counsel did not object to these instructions, and thus waived all but plain error. *Munson v. State*, 758 P.2d 324, 332 (Okl.Cr. 1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 820, 102 L.Ed.2d 809 (1989). Appellant argues these instructions allowed the jury to substitute the *general* criminal intent necessary to find aiding and abetting for the *specific* intent to kill required to prove malice aforethought, an element of first degree murder.

The instructions as a whole do not support this argument. The jury was clearly and correctly instructed on (1)

the malice aforethought element of murder in the first degree, (2) the definition of malice aforethought as the deliberate intent to take a human life, and (3) the State's burden to prove beyond a reasonable doubt that the defendant formed the specific criminal intent of malice aforethought. These instructions sharply channel the jury's discretion. While it could find the defendant aided and abetted in the murder by finding a design to commit the crime, it could convict for first degree murder only after finding a specific intent to kill beyond a reasonable doubt.

The following instruction is challenged in the fourth proposition of error:

> No person may be convicted of Murder in the First Degree unless his conduct caused the death of the person allegedly killed. A death is caused by conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life.

Oklahoma Uniform Jury Instructions-Criminal 426. Appellant bases his challenge on the Commission Comment which advises this instruction is superfluous where the defendant does not dispute the cause of death but argues he is not the perpetrator. This issue clearly focuses the importance of the appellate court giving great deference to the discretion of the trial court in matters of jury instruction. *See Sellers v. State*, 809 P.2d 676, 685 (Okl.Cr.), *cert. denied*, 502 U.S. 912, 112 S.Ct. 310, 116 L.Ed.2d 252 (1991); *Allison v. State*, 675 P.2d 142, 151 (Okl.Cr. 1983).

Appellant does not dispute the evidence is sufficient to prove he hit Webb over the head with a baseball bat and caused a three inch gash. He based his defense on the

fact Webb died from thermal injuries, not from the blow to the head, and *he* did not set Webb on fire. Because the evidence indicates Johnson and Masquat both participated in the murder, the trial court properly exercised its discretion by using an abundance of caution in instructing the jury on causation. We also note trial counsel was satisfied with this instruction and did not object. Only plain error thus is preserved for appellate review, and we find no error at all. *See Sellers,* 809 P.2d at 685.

III. SECOND STAGE OF TRIAL: SENTENCING

A. CONSTITUTIONALITY OF AGGRAVATING CIRCUMSTANCES

Appellant argues both aggravating circumstances found by the jury are unconstitutionally vague: (1) that the murder was especially heinous, atrocious and cruel; and (2) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *See* 21 O.S.1991, § 701.12(4), (7).

In this jurisdiction it is well settled that the "heinous, atrocious or cruel" aggravating circumstance is not arbitrary or capricious, and does not run afoul of the Eighth Amendment of the federal constitution. *See Mayes v. State,* 887 P.2d 1288, 1319 (Okl.Cr. 1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 1260, 131 L.Ed.2d 140 (1995); *Williamson v. State,* 812 P.2d 384 (Okl.Cr. 1991), *cert. denied,* 504 U.S. 968, 112 S.Ct. 2325, 119 L.Ed.2d 244 (1992); *Workman v. State,* 824 P.2d 378 (Okl.Cr.), *cert. denied,* 506 U.S. 890, 113 S.Ct. 258, 121 L.Ed.2d 189 (1991); *Stouffer v. State,* 742 P.2d 562

(Okl.Cr. 1987), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988).

The "continuing threat" aggravating circumstance likewise has been determined not to be unconstitutionally vague. *See Snow v. State*, 876 P.2d 291 (Okl.Cr. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1165, 130 L.Ed.2d 1120 (1995); *Malone v. State*, 876 P.2d 707 (Okl.Cr. 1994); *Allen v. State*, 871 P.2d 79 (Okl.Cr.) *cert. denied*, ___ U.S. ___, 115 S.Ct. 370, 130 L.Ed.2d 322 (1994); *Woodruff v. State*, 846 P.2d 1124 (Okl.Cr.), *cert. denied*, 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993); *Fox v. State*, 779 P.2d 562 (Okl.Cr. 1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1538, 108 L.Ed.2d 777 (1990). We find no reason to revisit these issues.

Appellant challenges the constitutionality of the so-called "anti-sympathy" instruction in his thirteenth proposition of error. The trial court instructed the jury in the first-stage of trial, "You should not let sympathy, sentiment or prejudice enter into your deliberations." This instruction was incorporated into the second stage. The Appellant argues this instruction creates a reasonable likelihood that the jury refused to consider relevant mitigating evidence. The Appellant acknowledges the tide of case law is against him, but urges this Court to find guidance in the dissent of *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) rather than the majority opinion. We consistently reject this challenge, and again find the anti-sympathy instruction does not mislead the jury into ignoring mitigating evidence. *See Harjo v. State*, 882 P.2d 1067, 1079 (Okl.Cr. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2007, 131 L.Ed.2d 1007 (1995); *Fisher v. State*, 845 P.2d 1272, 1277 (Okl.Cr.), *cert. denied*, 509 U.S. 911, 113

S.Ct. 3014, 125 L.Ed.2d 704 (1992); *Stiles v. State*, 829 P.2d 984, 994-95 (Okl.Cr. 1992); *Fox*, 779 P.2d at 574-75.

B. INSTRUCTION ON THE USE OF MITIGATING EVIDENCE

Appellant raises three other issues in the thirteenth proposition of error regarding instruction on the use of mitigating evidence. He argues that by instructing the jury that mitigating circumstances are those which in fairness and mercy *may* be considered as extenuating or reducing the degree of moral culpability or blame, the trial court allowed the jury to ignore mitigation evidence at its discretion. This argument has been rejected repeatedly by this Court, and we find no reason to revisit it. *See Mayes*, 887 P.2d at 1319-1320; *Harjo*, 882 P.2d at 1081-1082; *Williamson*, 812 P.2d at 409.

Next, Appellant argues the trial court erred by failing to instruct the jury it was not required to be unanimous in its findings of mitigating circumstances. This argument is also consistently rejected by this Court. *McGregor v. State*, 885 P.2d 1366 (Okl.Cr. 1994); *Pickens v. State*, 850 P.2d 328 (Okl.Cr. 1993), *cert. denied*, 510 U.S. 1100, 114 S.Ct. 942, 127 L.Ed.2d 232 (1994); *Castro v. State*, 844 P.2d 159 (Okl.Cr. 1992), *cert. denied*, 510 U.S. 844, 114 S.Ct. 135, 126 L.Ed.2d 98 (1993); *Clayton v. State*, 840 P.2d 18 (Okl.Cr. 1992), *cert. denied*, 507 U.S. 1008, 113 S.Ct. 1655, 123 L.Ed.2d 275 (1993); *Stiles*, 829 P.2d at 997.

Finally, the Appellant challenges the so-called "weighing" instruction in which the trial court instructed the jury it must find the aggravating circumstances beyond a reasonable doubt, and that it was authorized to

impose the death penalty if the aggravating circumstances outweighed the mitigating evidence. Again, we find no reason to revisit this issue which is rejected consistently by this Court. *See Walker v. State*, 887 P.2d 301, 323 (Okl.Cr. 1994); *Thomas v. State*, 811 P.2d 1337, 1351 (Okl.Cr.), *cert. denied*, 502 U.S. 1041, 112 S.Ct. 895, 116 L.Ed.2d 798 (1991).

C. SUFFICIENCY OF THE EVIDENCE TO PROVE CONTINUING THREAT

Appellant argues the only evidence supporting the continuing threat aggravating circumstance is his "relatively minor role" of hitting the victim with the baseball bat, hostile statements he made about the victim prior to the murder, and two domestic disturbances between the Appellant and his wife.

The most compelling evidence supporting continuing threat comes from the facts surrounding the murder itself. The Appellant announced he would take the law into his own hands and murder Webb in a most cruel way if Webb hurt a child. Appellant then decided to burn Webb anyway, even though Webb had not hurt a child. The Appellant demonstrated he could "take care of" people he did not like by inflicting, what one medical witnesses called, the worst possible kind of pain.

This Court has recognized that a defendant's attitude is an important factor in the determination of future dangerousness. *Snow*, 876 P.2d at 298. A person who acts with utter disregard for human life is likely to do so again. *See Id.; Fisher v. State*, 736 P.2d 1003 (Okl.Cr. 1987), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2833, 100 L.Ed.2d 933

(1988). The record presents a number of incidents which reveal Mr. Johnson's attitude. Before carrying out the Webb murder the Appellant had threatened to hit his wife over the head with a baseball bat and burn her with gasoline. The record indicates Mr. Johnson's threats against Webb began after an incident in which he thought Webb had made a homosexual pass at him. Mr. Johnson's statements to the apartment manager and her husband, and tenants that he could "take care of" Webb indicate he acted as a vigilante, dishing out his own brand of justice. His extremely cruel action proves beyond a reasonable doubt an utter disregard for human life, and a probability that he would commit criminal acts of violence in the future which would constitute a continuing threat to society.

D. USE OF NON-STANDARD LIMITING LANGUAGE

The trial court instructed the jury on the "heinous, atrocious or cruel" aggravating circumstance with a non-standard limiting paragraph. Following *Stouffer v. State*, 742 P.2d 562, 563 (Okl.Cr. 1987), when trial courts instruct on this aggravating circumstance, the following paragraph is to be used:

> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or *serious physical abuse.* (emphasis added)

OUJI-CR 436; *see, Foster v. State*, 779 P.2d 591, 593 (Okl.Cr. 1989), *cert. denied*, 497 U.S. 1032, 110 S.Ct. 3293, 111

L.Ed.2d 801 (1990); *Battenfield v. State*, 816 P.2d 555, 565 (Okl. Cr. 1991), *cert. denied*, 503 U.S. 943, 112 S.Ct. 1491, 117 L.Ed.2d 632 (1992).

The trial court in this case omitted the word "physical" from the last phrase of the limiting paragraph. The trial court thus instructed the jury the aggravating circumstance was directed to those crimes where the death of the victim was preceded by torture of the victim or "serious abuse". This, the Appellant argues in his eleventh proposition of error, requires reversal for it "dramatically lessened" the standard of proof required for the jury to find this aggravator.

The State counters with a three-fold argument: (1) the defendant did not object to this instruction and has thus waived all but plain error, (2) the evidence was sufficient to support the "torture" prong of the limiting paragraph, thus the error is harmless; and (3) this Court can apply the proper narrowing construction and find the evidence sufficient to support it.

The Appellant's failure to object at trial does waive all but plain error. *Munson*, 758 P.2d at 332. In this sensitive area of capital sentencing, we are constrained to find deviation from the well-established and constitutionally firm instruction is error. We are not persuaded, however, that the error dramatically lessened, or indeed lessened *at all* the standard of proof which the jury had to apply to find this aggravator.

From a practical semantic standpoint, when we compare the phrase "serious physical abuse", with the phrase "serious abuse", we find the term "physical" does not address the degree of suffering required to satisfy the

limitation. Rather, it addresses the type of harm which may satisfy this aggravating circumstance. In contrast, the degree of suffering is addressed by both of the words which frame it. The harm must be both *serious* and rise to the level of *abuse*. Those words control the standard of proof, and they were given to the jury intact. We thus distinguish the case before us from *Pickens v. State*, 885 P.2d 678 (Okl.Cr. 1994) in which the Court found the use of the limiting phrase, "torture or serious physical harm", in concert with other errors, to require reversal. *Id.* at 684.

This error is serious, and we must admonish the trial bench across the state to vigilantly guard against straying from the constitutional standard in capital sentencing. However, we find beyond a reasonable doubt that it is harmless, for it did not alter the standard of proof, and thus could have had no impact on the sentencing decision. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

E. TRIAL COURT FAILURE TO GIVE TRIGGERMAN INSTRUCTION SUA SPONTE

In the third proposition of error the Appellant argues the trial court erred by failing to require the jury to make a finding of individual guilt prior to imposing the death sentence. This, Appellant argues, goes against the principle of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). The State responds that the so-called "triggerman" instruction is appropriate only in felony murder cases when warranted by the evidence,

and the jury was required to consider Appellant's participation by the mitigating instruction which stated the defendant was a follower and not a leader.

Appellant bases his argument on his belief the jury was not properly instructed that they had to find he personally had malice aforethought in order to find him guilty in the first stage of trial. As we have found the jury was properly instructed in this regard, we need not examine this issue further.

F. TRIAL COURT'S RESPONSE TO THE JURY QUESTION ON THE MEANING OF "LIFE WITHOUT PAROLE"

Appellant challenges the trial court's response to the jury's question on the meaning of "life without parole" in his seventh proposition of error. The jury sent the following note to the trial judge during deliberations:

> We need to know! Is life without parole firm – Does it mean he can *never* be paroled?

(Court's Exhibit # 2). The trial court responded, over defense objection:

> It is inappropriate for you to consider the question asked.

Defense counsel wanted the trial court to respond:

> You have received all that you're going to receive in this matter.

The trial court rejected this response, stating parole was not "appropriate for the jury to be considering." Appellant argues this was error, for under the amendment to 21

O.S.Supp.1987, §§ 701.9 and 701.10, it is the province and indeed the duty for the jury to consider whether a defendant will be eligible for parole if he receives a non-capital sentence.

The State counters with two non-capital cases, *Suits v. State*, 507 P.2d 1260 (Okl.Cr. 1973) (reversed when judge responded substantively to the jury question when would the defendant be eligible for parole) and *Jones v. State*, 764 P.2d 914 (Okl.Cr. 1988) (approved response, "Your question cannot be answered by this court. This is not a matter for you to consider.") Neither case addresses the issue before us, for in a capital case the jury must compare the options of life, life without possibility of parole and death.

This Court has addressed this issue in three capital cases, *Mayes v. State*, 887 P.2d 1288 (Okl.Cr. 1994); *McCracken v. State*, 887 P.2d 323 (Okl.Cr. 1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995); and *McGregor v. State*, 885 P.2d 1366 (Okl. Cr. 1994). In *Mayes* the jury sent out a note from deliberations asking, "if life without parole was given was there ever a possibility of release from prison". 887 P.2d at 1316. The trial judge responded saying the instructions were self-explanatory. This Court resolved the issue saying:

> Therefore, while we hold a jury may logically consider the possibility or absence of parole in determining the sentence a capital murder defendant is to receive, we also hold there is no requirement for a trial judge to explain the Oklahoma parole process to a jury.

Id. at 1318. The *McCracken* jury sent out a note asking, "Does Life without Parole mean exactly that? *He would*

never under any circumstances, get out of prison?" (emphasis in original). The trial court responded,

I will instruct you again to look at your instructions. The law in Oklahoma provides a person convicted of Murder in the First Degree is punishable by death, by life without parole or life. You may retire and deliberate further.

887 P.2d at 334. In this case the Court held the instructions were self explanatory, and the trial court did not err by refusing a defense instruction setting forth Article VI, Section 10 of the state constitution which prohibits the governor from granting parole to a person who receives a sentence of life without parole. *Id.*

In *McGregor* the trial court did not respond to the jury's question "about what would happen to McGregor if he were sentenced to life without parole." 885 P.2d at 1383. This Court relied on *Mayes* to find no plain error.

The case before us presents a different facet of this argument. Over defense objection the trial court told the jury it was not appropriate for it to consider whether the defendant could "*never* be paroled". This is a misstatement of law, for as *Mayes* makes clear, the jury must consider the distinctions between life, life without parole and death as it reaches the sentencing decision. 887 P.2d at 316-18. The trial court's response to the jury is error. We must, therefore, determine whether this error requires reversal.

Misinstruction of the jury may be found harmless. *See Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 2421,

105 L.Ed.2d 218 (1989) (instruction with erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987) (misinstruction on elements of offense). The error may be deemed harmless only if we find beyond a reasonable doubt that it did not affect the jury's decision to impose the death penalty. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

McCracken, *McGregor*, and *Mayes* make clear that in this jurisdiction the jury is not to be told of the inner workings of the parole system, even when it must compare two life sentences: one with the possibility of parole, and one without the possibility of parole. In none of these cases did the trial judge give a responsive answer to the jury's question. Likewise, the judge's answer in this case was non-responsive. The ultimate effect of all of these responses was to force the jurors back to the plain language of the instructions. From the standpoint of what the jurors must do following the trial judge's response, we find no meaningful behavioral difference flowing from the approved responses in *McCracken*, *McGregor*, and *Mayes* which could be summarized as, "I am not going to answer that question", and the response in the case before us which could be summarized as, "Don't ask." We therefore find the trial judge's response in this case to be harmless beyond a reasonable doubt.

Having said that, we also believe the plain language of the jury instruction may be modified to provide greater clarity. We therefore approve, but do not require, the following modification to the second paragraph of Oklahoma Uniform Jury Instruction – Criminal 432:

Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by death, or imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

IV. PROSECUTORIAL MISCONDUCT

The Appellant cites two instances of alleged prosecutorial misconduct in his ninth proposition of error, one during *voir dire* and the other in the second-stage. Neither of these comments was objected to at trial, and thus all but fundamental error is waived. *Clayton v. State*, 840 P.2d 18, 29 (Okl.Cr. 1992), *cert. denied*, 507 U.S. 1008, 113 S.Ct. 1655, 123 L.Ed.2d 275 (1993). The appellant recognizes this obstacle, and argues the comments were so prejudicial that fundamental fairness was denied him.

When using his peremptory challenges to excuse two veniremen who had expressed reservations about the death penalty, the prosecutor stated, "I do no want to do violence to [the venireman's] conscience, so I'll excuse [her]." Appellant claims this telegraphed a subtle message to the venire pool that the death penalty was inevitable.

These statements were unnecessary, for no reason need be given for a peremptory strike, unless the opponent challenges the strike on Equal protection grounds under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *See*, 22 O.S.1991, § 654. However, this admittedly subtle message is so subtle that this Court fails to discern it. We find no error here.

In the second-stage closing argument the prosecutor told the jury that the defendant's organic brain damage and alcoholism, two mitigating factors listed by the court in its instructions, were "really things that count against the defendant in this case." Appellant relies on *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) to argue this violated his right under Eighth and Fourteenth Amendment to have his mental retardation considered as mitigating evidence. The State counters with *Nguyen v. State*, 769 P.2d 167 (Okl.Cr.), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989); and *Burrows v. State*, 640 P.2d 533 (Okl.Cr. 1982), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983) to argue the State may use any evidence as well as reasonable inferences therefrom in its closing argument.

We find *Penry* is not controlling for in that case the jury was prohibited from considering the defendant's mental retardation which was offered as mitigation. 492 U.S. at 320, 109 S.Ct. at 2947. The Appellant's jury was not prohibited from considering his reduced mental capacity, and the prosecutor was well within the bounds of fair argument to comment on the weight of the mitigation evidence from the State's perspective.

V. MANDATORY SENTENCE REVIEW

Pursuant to Title 21 O.S.1991, § 701.13(C), this Court shall determine (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of an aggravating circumstance as enumerated in 21 O.S.1991, § 701.12. After reviewing the

entire record on appeal we find no trial error infected the jury's deliberations with passion, prejudice or other arbitrary factor. The evidence is sufficient to support the finding by the jury of two statutory aggravating circumstances: (1) that the murder was especially heinous, atrocious or cruel; and (2) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *See* 21 O.S.1991, § 701.12(4)(7). Judgment and Sentence is AFFIRMED.

JOHNSON, P.J., and STRUBHAR, J., concur.

CHAPEL, V.P.J., specially concurs.

LUMPKIN, J., concurs in results.

CHAPEL, Vice Presiding Judge, specially concurring:

We continue to see case after case where the jury sends a note to the trial judge during deliberations inquiring about the possibility of parole. The reason why jurors repeatedly ask this question is because they are confused. They want, need, and deserve an answer. I continue to believe we should fashion an instruction which clarifies this issue for the jury.[1] I am concerned about the ramifications of our failure to do so since it seems clear to me that some jurors may be voting for a

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[1] See Chapel dissent in *Mayes v. State*, 887 P.2d 1288, 1324-25 (Okl.Cr. 1994) or *McGregor v. State*, 885 P.2d 1366, 1383 (Okl.Cr. 1994) where I discuss this issue.

death sentence only because they believe that life without parole really does not mean life without parole.

I therefore concur based on stare decisis.

LUMPKIN, Judge, concurring in results.

I concur in the result reached in this case; however, because I find some language which could be misleading, I cannot join entirely in the opinion.

Capital cases today receive a degree of scrutiny unprecedented in our history. A carelessly chosen or misplaced word or phrase can be taken out of context and create issues where none existed before. It is because of this I cannot join in the statement the failure to utilize a particular OUJI-CR instruction is "serious," yet harmless beyond a reasonable doubt. *Ante* at page 318. Are there some errors which are "serious" yet harmless, while other "serious" errors are not harmless? Are there errors which are not "serious" which are not harmless? The phrase used here adds nothing but confusion, and the entire paragraph implies there is an error of constitutional magnitude. I find none.

It is because of these potential "time bombs" I cannot join wholeheartedly in this otherwise well-reasoned opinion. I also once again urge this Court to adopt a unified *Spuehler*-type approach to evaluating both direct and circumstantial evidence. *See White v. State*, 900 P.2d 982, 993-95 (Okl.Cr. 1995) (Lumpkin, J., Specially Concurring).

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MARK DAVID JOHNSON Appellant, v. THE STATE OF OKLAHOMA Appellee.	)	Case No. F-93-281 (Filed Dec. 24, 1996)

ORDER GRANTING REHEARING

Mark David Johnson, Appellant, was tried by jury and convicted of First Degree Murder in Love County District Court Case No. CRF-91-46. The jury found two aggravating circumstances and recommended a sentence of death which was imposed by the trial court. Appellant is before the Court now on the grounds an issue duly submitted on appeal was overlooked. Appellate counsel filed a motion to supplement his brief with one additional proposition of error: that under *Pickens v. State,* 885 P.2d 678 (Okl.Cr.1994) the Information charging Johnson with murder was defective for it contained the term "premeditated design" and not "malice aforethought."

Rehearing is granted to consider this issue.

Appellant takes *Pickens* too far. The fatal flaw in the *Pickens* Information was the irreconcilable confusion of the language which alleged some elements of felony murder and some elements of malice aforethought murder in a single charging paragraph, and as a result, charged neither crime. Dicta in *Pickens* suggests the information must make "some reference" to malice aforethought in

order to adequately charge this form of murder. 885 P.2d at 683. While this may be so under the unique facts of *Pickens*, it is not a general rule. At the time Appellant was charged with malice murder, an Information was sufficient if it alleged facts to support every element of the crime charged and apprised a defendant of the charges against which he must defend himself. *Miller v. State*, 827 P.2d 875, 879 (Okl.Cr.1992).

The appellant does not argue he did not understand the charge against him. Therefore, the question before us is whether the charging paragraph was legally sufficient to charge malice murder. The charging paragraph stated in relevant part:

> That on the day and year and in the county aforesaid, MARK DAVID JOHNSON and RICKY LEE MASQUAT did unlawfully, willfully, and feloniously, while acting in concert each with the other and without authority of law, and with premeditated design to effect the death of one Billy Wayne Webb, a human being, did then and there kill one Billy Wayne Webb, by beating over the head with a baseball bat and pouring gasoline over the said Billy Wayne Webb and setting fire to him causing mortal wounds in the body of the said Billy Wayne Webb from which mortal wounds the said Billy Wayne Webb did languish and die . . .

"Malice aforethought", as defined by the Oklahoma Uniform Jury Instructions (OUJI), means a deliberate intention to take away the life of a human being. OUJI-428. While it would be preferred for the district attorneys across the state to use the term "malice aforethought"

when charging malice murder, we find the charging paragraph in Appellant's case sufficiently alleged every element of malice murder.

IF IS THEREFORE THE ORDER OF THE COURT rehearing is granted, and judgment and sentence is **AFFIRMED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of December, 1996.

/s/ Charles A. Johnson
CHARLES A. JOHNSON,
Presiding Judge

/s/ Charles S. Chapel
CHARLES S. CHAPEL,
Vice Presiding Judge

/s/ Gary L. Lumpkin
GARY L. LUMPKIN, Judge

/s/ James F. Lane
JAMES F. LANE, Judge

/s/ Reta M. Strubhar
RETA M. STRUBHAR, Judge

ATTEST:

/s/ James Patterson
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK DAVID JOHNSON, Petitioner-Appellant, v. GARY GIBSON, Warden, Oklahoma State Penitentiary, Respondent-Appellee.	No. 00-7008

ORDER

Filed May 24, 2001

Before **KELLY, BALDOCK** and **HENRY,** Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Ardell Schuler
Deputy Clerk
